DISSENTING OPINION OF PRESIDENT WINIARSKI

[Translation]

To my great regret I am unable to agree with the Court's affirmative reply to the question submitted to it by the request of the General Assembly. I shall indicate my reasons as briefly as possible, confining myself to what is essential. I shall therefore refrain from discussing the points on which I am not in agreement with the Opinion, such, for example, as the interpretation of Article 11, paragraph 2, of the Charter.

In the first place it would seem that although the request appears to contain an exact statement of the question, as required by Article 65 of the Statute of the Court, that question requires to be interpreted, and here I differ from the view expressed in the Opinion. The Opinion distinguishes three questions in paragraph 2 of Article 17: the identification of the expenses of the Organization, the apportionment of those expenses, and the obligation of Member States to bear them, and it states that it is only the first of these which is raised by the request for opinion. This limitation of the problem seems to me to be pregnant with consequences. Again, the Opinion says: "The amount of what are unquestionably 'expenses of the Organization within the meaning of Article 17, paragraph 2' is not in its entirety apportioned by the General Assembly and paid for by the contributions of Member States, since the Organization has other sources of income." It follows that the reply that all the expenditures authorized by the General Assembly which are enumerated in the request constitute "expenses of the Organization within the meaning of Article 17, paragraph 2" provides no clear indication to the General Assembly, which expressed in the preamble "its need for authoritative legal guidance as to obligations of Member States ... in the matter of financing the United Nations operations in the Congo and in the Middle East".

The question might however be understood in a different way: the reference to paragraph 2 of Article 17 limits the scope of the question and gives it its true meaning. Of the total amount of the expenses, those which are not met by voluntary contributions or from other sources of income in accordance with the decisions of the General Assembly must be borne by the Members according to the apportionment decided upon by the General Assembly. The terms of the resolution appear to confirm this interpretation. The reference to the need for legal guidance is illustrated by the facts set out in the dossier. According to the "Statement on the collection of contributions as at 31 December 1961" (Congo *ad hoc* Account) for the period 14 July to 31 December 1960, 35 Member States paid their assessed contributions, 64 States did not pay; for the

period 1 January to 31 October 1961 the proportion of those who paid to those who did not pay was 21 to 78. Long and important discussions, which are set out in the dossier, began in the General Assembly from the time of the earliest resolutions in 1956 and continued until December 1961 when the proposal to request an advisory opinion was adopted. The debates revealed profound differences of view as to the methods to be adopted to meet the expenditures relating to the operations in the Middle East and in the Congo. These facts confirm the view that in the question formulated in the request for opinion the emphasis must be placed on the words "within the meaning of Article 17, paragraph 2, of the Charter".

In the course of the lengthy debates of the Working Group of Fifteen (June-November 1961) the question of the conformity with the Charter of the General Assembly resolutions relating to the financing of the above-mentioned operations was discussed. Thus, for instance, a statement was formulated which appeared to go to the heart of the problem:

> "11. When the Security Council or the General Assembly *recommends* the execution, with United Nations military forces, of an operation for the maintenance of peace, the expenses involved in such operations cannot be considered as 'expenses of the Organization' within the meaning of Article 17 of the Charter and the financial contribution of Members to the cost of such operations will be of a voluntary nature."

Here, too, the voting revealed a deep division of opinion. In these circumstances, the French delegation proposed an amendment to the text of the question to be submitted to the Court; the amendment was to the effect that it should first be asked whether the expenditures referred to were "decided in conformity with the provisions of the Charter". This amendment was rejected, a fact which has been interpreted in different ways; this question having been considered in the Opinion, it is nor for me to consider it further.

By definition, only lawful expenses can be expenses of the Organization; they must be validly approved and validly apportioned among the Members. The question is therefore one of the interpretation of the Charter; the Court cannot answer the question submitted to it without examining the problem of the validity of the resolutions authorizing the expenditures, that is to say, the problem of their conformity with the Charter.

It has been said that since the General Assembly has exclusive powers in budgetary matters—which is not disputed—if it takes a decision by the requisite majority, the expenses are validly authorized and apportioned in accordance with Article 17, paragraphs 1 and 2. But that is a purely formal validity, which is a primary condition of any authorization. To limit the question to that of formal validity would be too simple and would not justify the requesting of the Court's opinion.

In the Court's Advisory Opinion on the interpretation of Article 4 of the Charter (1948) it is said: "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment." The French delegation's amendment did not expressly ask that the Court should examine the Security Council and General Assembly resolutions in pursuance of which operations were undertaken in the Middle East and in the Congo; but in examining the conformity with the Charter of the resolutions authorizing the expenditures, the Court would inevitably have been led to examine this problem too; this has been very clearly shown by Judge Bustamante y Rivero in his dissenting opinion, and I can therefore confine myself to the General Assembly resolutions authorizing the expenditures.

But it has also been said that the Assembly, which is a political organ, interprets the Charter by applying it and that its interpretation is final. This is true to a certain extent and particularly where its interpretation has been generally accepted by Member States. This question was very thoroughly considered at the San Francisco Conference and the results of the deliberations were formulated in the report of the Special Subcommittee of Committee IV/2 which concludes thus:

> "It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force."

And the report continues:

> "In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment."

This decision was adopted—unopposed—on 22 June 1945; the rule would seem still to hold good.

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It is recognized in the Opinion that to interpret paragraph 2 of Article 17 it is necessary to look not only at Article 17 as a whole, but also at all the other relevant provisions of the Charter. In this respect the Opinion follows the rule which has been well established since the time of Roman law: "*Incivile est* (this is a very strong expression) *nisi tota lege perspecta, una aliqua particula ejus proposita judicare vel respondere.*" In his celebrated charter on the interpretation of treaties (Book II, Chapter XVII) Vattel applies the same rule to international law.

It is thus this general rule for the interpretation of statutes and conventions which it is sought to follow in the Opinion. I regret that I cannot always agree with the result of this examination.

The Opinion attaches great importance to the purposes of the Organization as set forth in Article 1 of the Charter. Indeed, it has been asserted that these purposes and in particular the maintenance of international peace and security may provide a legal justification for certain decisions, even if these are not in conformity with the Charter, and that in any event a consideration of the purposes must furnish guidance as to the interpretation of the Charter. In the case before the Court, however, this argument certainly has not the importance which there is a temptation to attribute to it; on the contrary, care must be taken not to draw conclusions too readily from it.

The Charter has set forth the purposes of the United Nations in very wide, and for that reason too indefinite, terms. But—apart from the resources, including the financial resources, of the Organization—it does not follow, far from it, that the Organization is entitled to seek to achieve those purposes by no matter what means. The fact that an organ of the United Nations is seeking to achieve one of those purposes does not suffice to render its action lawful. The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action.

The intention of those who drafted it was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council. It is only by such procedures, which were clearly defined, that the United Nations can seek to achieve its purposes. It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article 1 of the Charter, but that is the way in which the Organization was conceived and brought into being.

The same reasoning applies to the rule of construction known as the rule of effectiveness *(ut res magis valeat quam pereat)* and, perhaps less strictly, to the doctrine of implied powers.

Reliance has been placed upon practice as providing justification for an affirmative answer to the question submitted to the Court. The technical budgetary practice of the Organization has no bearing upon the question, which is a question of law. From the strictly legal point of view, it is difficult to find here anything that would justify a firm conclusion. The way in which the parties have consistently applied a convention may certainly provide evidence of their intention for the purpose of its interpretation. Furthermore, if a practice is introduced without opposition in the relations

between the contracting parties, this may bring about, at the end of a certain period, a modification of a treaty rule, but in that event the very process of the formation of the new rule provides the guarantee of the consent of the parties. In the present case the controversy arose practically from the beginning in 1956, and the Secretary-General, in paragraph 15 of his report of 6 November of that year, said the following:

> "The question of how the Force should be financed likewise requires further study. A basic rule which, at least, could be applied provisionally, would be that a nation providing a unit would be responsible for all costs for equipment and salaries, while all other costs should be financed outside the normal budget of the United Nations."

And resolution 1001 (ES-I) adopted by the General Assembly on 17 November 1956 "approves provisionally the basic rule concerning the financing of the Force laid down in paragraph 15 of the Secretary-General's report" (para. 5).

In resolution 1089 (XI) of 21 December 1956 we read:

> "Considering ... that several divergent views, not yet reconciled, have been held by various Member States on contributions or on the method suggested by the Secretary-General for obtaining such contributions..."

Resolution 1090 (XI) of 27 February 1957 "decides that the General Assembly, at its twelfth session, shall consider the basis for financing any costs of the Force in excess of $10 million not covered by voluntary contributions".

Resolution 1263 (XIII) of 14 November 1958 is still seeking to see matters clearly: it "requests the Fifth Committee to recommend such action as may be necessary to finance the continuing operation of the United Nations Emergency Force".

Lastly, resolution 1337 (XIII) of 13 December 1958 "requests the Secretary-General to consult with the Governments of Member States with respect to their views concerning the manner of financing the Force in the future..."

As settlements fell due, the expenses were in large part met out of various funds, even after obligatory contributions had been voted for.

In respect of the financing of the United Nations operations in the Congo, the General Assembly resolutions decided that the expenses should be apportioned among the Member States according to the ordinary scale of assessments, but these resolutions, as I have indicated, were not followed and the number of Member States which refuse to pay is too large for it to be possible to disregard the legal significance of this fact. I would recall that the military

operations in Korea were paid for by voluntary contributions as were a number of "civilian" operations in which there is also to be descerned acertain connection with international peace and security. It is therefore difficult to assert, in the case before the Court, either that practice can furnish a canon of construction warranting an affirmative answer to the question addressed to the Court, or that it may have contributed to the establishment of a legal rule particular to the Organization, created *praeter legem*, and, still less, that it can have done so *contra legem*.

It is sometimes difficult to attribute any precise legal significance to the conduct of the contracting parties, because it is not always possible to know with certainty whether they have acted in a certain manner because they consider that the law so requires or allows, or for reasons of expediency. However, in the case referred to the Court, it is established that some at least of the Member States refuse to comply with the decisions of the General Assembly because they dispute the conformity of those decisions with the Charter. Apparently they are of opinion that the resolutions cannot be relied upon as against them although they may be valid and binding in respect of other States. What is therefore involved is the validity of the Assembly's resolutions in respect of those States, or the right to rely upon them as against those States.

It has been said that the nullity of a legal instrument can be relied upon only when there has been a finding of nullity by a competent tribunal. This reasoning must be regarded as echoing the position in municipal or State law, in the international legal system. In the international legal lystem, however, there is, in the absence of agreement to the contrary, no tribunal competent to make a finding of nullity. It is the State which regards itself as the injured party which itself rejects a legal instrument vitiated, in its opinion, by such defects as to render it a nullity. Such a decision is obviously a grave one and one to which resort can be had only in exceptional cases, but one which is nevertheless sometimes inevitable and which is recognized as such by general international law.

A refusal to pay, as in the case before the Court, may be regarded by a Member State, loyal and indeed devoted to the Organization, as the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid; in such a case it constitutes a grave symptom indicative of serious disagreement as to the interpretation of the Charter. As this Court has on one occasion said, the United Nations is not a super-State, and paragraph 1 of Article 2 of the Charter states that "The Organization is based on the principle of the sovereign equality of all its Members."

A serious legal objection to the validity of the General Assembly resolutions authorizing and apportioning the expenses may be briefly formulated as follows: these resolutions ignore the fact that

the resolutions authorizing the operations have the character of recommendations. By levying contributions to meet the cost of the operations from all States in accordance with Article 17, paragraph 2, the resolutions of the General Assembly appear to disregard the fundamental difference between the decisions of the Security Council which are binding on all Member States (Chapter VII of the Charter) and recommendations which are not binding except on States which have accepted them.

As is noted in the Opinion the General Assembly does not indicate the articles of the Charter on which its resolutions are based. The same is true of the Security Council. Of 29 resolutions listed in the request, only one, that of the Security Council of 9 August 1960, in which all Member States are called upon to accept and carry out its decisions, refers to Articles 25 and 49 which do not appear to be of such a character as to enlighten the Court (the General Assembly repeated the words in its resolution 1474 (ES-IV) of 20 November 1960); at one point, the Secretary-General envisaged, with some hesitation, the possibility of invoking Article 40; finally he adopted a negative position: the United Nations operations in the Middle East and in the Congo were not undertaken in pursuance of binding decisions under Chapter VII of the Charter. The General Assembly appears to have adopted the same position and this view is shared in the Opinion.

But, if there is no longer any question of the binding decisions of the Security Council referred to in Chapter VII, then these are recommendations; recommendations of the Security Council and the General Assembly; General Assembly resolution 377 (V), the conformity of which with the Charter has itself sometimes been regarded as at least dubious, itself only speaks of recommendations.

The difference between binding decisions and recommendations constitutes one of the bases of the whole structure of the Charter. Decisions are the exception in the system of the means provided for the maintenance of international peace and security; they are taken in grave cases and it is only in those cases that Member States have consented to accept the necessary limitation of the exercise of their sovereignty. Recommendations are never binding and the United Nations must in all its activities ever have in view that its means of action are thus limited.

It follows that if it be recognized that the expenditures enumerated in the request constitute expenses of the Organization, inevitably the question arises whether participation in these expenses is obligatory for all Member States, as appears to be suggested by the question in the request and as is accepted in the Opinion. And yet it is apparent that the resolutions approving and apportioning these expenses are valid and binding only in respect of the Member States which have accepted the recommendations.

It is difficult to see by what process of reasoning recommendations could be held to be binding on States which have not accepted them. It is difficult to see how it can be conceived that a recommendation is partially binding, and that on what is perhaps the most vital point, the financial contribution levied by the General Assembly under the conditions of paragraph 2 of Article 17. It is no less difficult to see at what point in time the transformation of a non-binding recommendation into a partially binding recommendation is supposed to take place, at what point in time a legal obligation is supposed to come into being for a Member State which has not accepted it.

This leaves unresolved the question how and when the acceptance of a recommendation by a Member State, or the refusal to accept it, is to be placed on record, but the answer to that question should present no difficulty for the Organization.

To the question as framed in the request, which appears to contemplate only the answer "yes" or "no", it is not, in my opinion, possible to give a legally adequate answer. My reply can only be in the negative.

(Signed) B. WINIARSKI.