SEPARATE OPINION OF JUDGE SIR GERALD FITZMAURICE

I

I have not written this separate opinion because I disagree with the operative conclusion of the Opinion of the Court. I consider that the expenditures referred to in the Assembly's Request are without doubt expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter. I also agree with much of the reasoning on which the Court's Opinion is based, although it goes more into matters of pure detail and procedure than I would have thought necessary. But as I shall indicate, I have reservations on certain points of principle having wider implications, though they do not affect the final conclusion reached in the present case.

Moreover (and this constitutes my main reason for writing a separate opinion), it would seem that the Opinion of the Court, while dealing elaborately with certain matters, refrains designedly from discussing other, more general, aspects of the subject, involving difficulties which have troubled a number of those who have had to do with it. The Opinion, in short, ignores various points which appear to me to be very relevant; for although the "legal guidance" mentioned in the preambular part of the Request is asked for in connection with the question of "financing the United Nations operations in the Congo and in the Middle East", I consider that even in these contexts alone, this guidance must fall short of full utility if it fails to deal with certain more general matters, and also with one or two others that the Court has not gone into.

For instance, the Court has taken the view that it is only required to state whether certain specified expenditures are expenses of the Organization, and is not called upon to declare what are the financial obligations of Member States (hence the change in the title of the case). To my mind the two questions are indissolubly linked, for except in so far as there is an obligation to contribute to expenditures which duly rank as "expenses", there is no point in determining whether these expenditures are expenses or not; and as I shall show, it is necessary to deal with certain types of case in which it could be contended that, although given expenditures are expenses of the Organization, there may not necessarily or always be an obligation for every Member State to contribute to them.

II

A short answer to the question put in the Request could be given on the following lines:

first, that the notion of expenses of the Organization cannot be confined merely to its regular administrative expenses, since the latter are not incurred as an end in themselves but as a means to an end, namely, to enable the Organization to carry out the essential substantive functions for which it exists; therefore, to regard the obligation of Member States as extending only to routine administrative expenses would be as stultifying as it would be disingenuous [1];

secondly, that the notion of expenses of the Organization must extend at least to those incurred in the discharge of the essential functions of the Organization for which it was brought into existence; that peace-keeping activities constitute such a function; and that the expenditures specified in the Request for an advisory opinion relate to peace-keeping activities;

thirdly, that the Charter does not exclude, and indeed (subject to specified conditions and limitations) makes express provision for the carrying out of certain peace-keeping activities by the Assembly (Articles 11, 14, 35, etc.); and that the activities of the Assembly in respect of which the expenditures at issue were incurred were of this kind, and did not exceed the conditions and limitations in question.

Broadly speaking, though in greater detail and with more elaboration, these are some of the main considerations on which the Opinion of the Court is in fact founded and, framed as indicated above, I concur in them. The Court however, in addition to these considerations, and more particularly in connection with those coming under the third of them, has alluded to the possibility that, even if, in carrying out the activities concerned, the Assembly was not acting in conformity with the division of functions established by the Charter, this would not cause the resulting expenditures to cease being expenses of the Organization, provided that the related activities came within the functions of the Organization as a whole—the irregularity ranking merely as a matter appertaining to the internal economy of the Organization. This is an idea which I think must not be pressed too far (nor does the Court rely on it except incidentally). It is certainly correct in one sense, namely, that internal irregularities would not affect liabilities definitely incurred by or on behalf of the Organization, in relation to third parties outside

[1] For instance, it would be a curious position, to say the least of it, if Member States were obliged to contribute to paying the salaries of the Secretariat, but not to the expenses of carrying out the functions of the Organization, for the purposes of which the Secretariat had been engaged.

the Organization or its membership [2]. But what is really in question here is the relationship of the Member States *inter se*, and *vis-à-vis* the Organization as such, and there can be no doubt that, in principle at least, expenditures incurred in excess of the powers of the expending body are invalid expenditures. The question is, are they invalid if they merely exceed the powers of the particular organ authorizing them, but not those of the Organization as a whole? It is true that there are cases, both in the domestic and in the international legal spheres, where all that matters (except on the purely internal plane) is that a certain act has in fact been performed, or not performed, as the case may be, and where the reasons for, or channels through which the performance or non-performance has taken place are immaterial. But in the present case, the question of the financial obligations of Member States in relation to the Organization is a question moving on the internal plane; and if an instrument such as the Charter of the United Nations attributes given functions in an exclusive manner to one of its organs, constituted in a certain way—other and different functions being attributed to other and differently constituted organs—this can only be because, in respect of the performance of the functions concerned, importance was attached to the precise constitution of the organ concerned [3].

It is not however necessary to express any final view on this matter, for the simple reason that, as the Opinion of the Court brings out, the Charter does not, in fact, in the matter of peace-keeping activities, establish any rigid general division of function between the role of the Security Council and that of the Assembly. Enforcement or coercitive action *stricto sensu* is of course exclusively for the Security Council, but I agree with the Court that the action of the Assembly in the Middle East and in the Congo has not been of this character. Furthermore, and as indicated by the Court, I consider that this action of the Assembly has fallen within the scope of its functions under the Charter, and has not exceeded the limitations thereby imposed on the scope and exercise of those functions.

Beyond a somewhat general statement of this character, I would not wish to go for present purposes. While I agree with the general trend of the Court's reasoning on what I will call the "military" provisions of the Charter, I would have to reserve my position on a number of points of formulation if I thought it necessary to go into these provisions in detail.

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[2] I will postulate for present purposes that the third party is *prima facie*, entitled in the particular circumstances, to assume that the liabilities have been validly incurred.

[3] Clearly an organ constituted in a particular way will tend to carry out a given function in a different way from an organ differently constituted, and will have been entrusted with that function for that reason, *inter alia*.

III

Much of the Opinion of the Court is concerned with and based on a consideration of what has been the actual practice of the United Nations in financial matters, both generally and in relation to the particular expenditures here involved. I would have preferred to see less reliance on practice and more on ordinary reasoning. The argument drawn from practice, if taken too far, can be question-begging.

However, no one would deny that practice must be a very relevant factor. According to what has become known as the "principle of subsequent practice", the interpretation in fact given to an international instrument by the parties to it, as a matter of settled practice, is good presumptive (and may in certain cases be virtually conclusive) evidence of what the correct legal interpretation is—a principle applied by the Court on several occasions [4]. But where this is the case, it is so because it is possible and reasonable in the circumstances to infer from the behaviour of the parties that they have regarded the interpretation they have given to the instrument in question as the legally correct one, and have tacitly recognized that, in consequence, certain behaviour was legally incumbent upon them. In the present context, it is necessary to take into account the fact that any Member State can at all times, and in any event, contribute *voluntarily* to the expenses of the Organization, whether or not it recognizes a legal obligation to do so; and furthermore, that a number of the expenditures of the Organization are in fact financed partly and, in certain important cases, even wholly or mainly by voluntary contributions [5]. In these circumstances, it is hardly possible to infer from the mere fact that Member States *pay*, that they necessarily admit in all cases a positive legal obligation to do so; and where, as has not infrequently occurred, they have only paid under or after protest, the easier inference is that this was because, for whatever reason (by no means necessarily consciousness of legal obligation) they were unwilling in the last resort to withhold a contribution.

Nevertheless, while the existence of these considerations renders it impossible to regard the practice of the United Nations as conclusive in the matter—(it is indeed the validity of some part of that practice which is put in issue by the present Request)—it cannot be less than very material; and even if a majority vote cannot in the formal sense bind the minority, it can, if consistently exercised in a

[4] See the *South-West Africa* case (1950), also the *(Second) Admissions, Corfu, Iranian Oil Company* and *U.S. Nationals in Morocco* cases.

[5] As to these, see below at the end of the first paragraph of Section VIII.

particular way, suffice to establish a settled practice which a tribunal can usefully and properly take account of.

IV

Subject to the foregoing reservations (which however go to reasoning only) I agree that the particular expenditures mentioned in the Request rank as expenses of the Organization; but in arriving at that conclusion the Court has failed to indicate in terms (though it may to some extent have implied) what are the general limitations of principle within which any given expenditure can rank as an expense of the Organization; and this is something which I think an advisory opinion on the financial obligations of Member States ought to do, even though it is only their obligations respecting certain particular expenditures that are actually in question.

In my opinion, two—partly overlapping but technically distinct—conditions must be fulfilled before any given expenditure can rank as an expense of the Organization. *First*, the expenditure must belong to the *genus* "expense"—that is to say it must come within the class or category of expenditure normally (and which can in the particular circumstances reasonably be) regarded as having the basic nature of an "expense" properly so called. A sum of money does not become an expense merely by being expended, or by its expenditure being authorized. *Secondly*, even if the expenditure in question belongs in principle to the *genus* "expense", it must have been validly incurred, for a purpose which was itself valid and legitimate, in order to rank as an expense within the meaning of Article 17, paragraph 2, involving for Member States an obligation to contribute to it. There will remain a *third* question, namely, does it follow that because a given expenditure is an "expense", every Member State is invariably, and irrespective of circumstances, bound to contribute to it according to that Member's apportioned share? I shall indicate in due course why, in my opinion, the answer to this last question is not self-evident.

It will be convenient to deal first with the second of the above-mentioned questions—that of the validity of any given expenditures. This involves issues such as the powers of the authorizing organ, whether the object of the expenditure falls within the scope of the purposes of the Organization, and so forth, which must depend on the particular circumstances of each case, and to which no general solution is possible. In the present case, an affirmative answer on the question of the validity of the expenditures concerned can and must be given, as indicated by the Court. But 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.

The solution propounded by the Court is a twofold one. One aspect is indicated in the statement made in the Opinion (italics added) that "As anticipated in 1945 ... each organ [sc. of the United Nations] must, *in the first place at least,* determine its own jurisdiction"—i.e. the scope of its own powers and the validity of their exercise. The phrase which has been italicized in the above citation makes the view which the citation puts forward acceptable up to a certain point. It is no doubt true that any objection to a given exercise of powers, or to action based on the presumed existence of certain powers, must be advanced in the first instance in the organ concerned, and will be subject to a ruling by it, in the form of a motion or resolution adopted by a majority vote.

The real question however, in my view (and the Court does not deal with it), is whether such a ruling would have to be regarded as final. In the course of the oral proceedings, the Court was in effect invited to take the view that this would be the case. It was suggested, for example, that the mere fact that certain expenditures had been actually apportioned by the Assembly, was conclusive as to their validity. Apportionment would certainly be conclusive as to the majority view of the Assembly, but this merely begs the question. It amounts to saying that even if, on an objective and impartial assessment, given expenditures had in fact been invalidly and improperly incurred or authorized, they would nevertheless stand automatically validated by the act of the Assembly in either apportioning them among Member States or, in the event of a challenge, subsequently resolving that the apportionment was good.

This is a view which I am unable to accept. It is too extreme. Moreover, I do not read the Opinion of the Court as going so far. The issues involved clearly transcend the merely financial problem, and even on the financial side they go deeper; for if the Assembly had the power automatically to validate any expenditure, as some Governments appear to have claimed in their written or oral statements, this would mean that, merely by deciding to spend money, the Assembly could, in practice, do almost anything, even something wholly outside its functions, or maybe those of the Organization as a whole. Member States would be bound to contribute, and accordingly a degree of power, if not unlimited, certainly much greater than was ever contemplated in the framing of the Charter, would be placed in the hands of the Assembly. In this way, there could well come about an actual realization of the fears expressed in one of the written statements presented to the Court, possibilities which, otherwise, are perhaps not very serious, so

long as Member States retain at least a last resort right not to pay [6].

The problem is to determine what that right consists of and, more particularly, in what conditions it can be exercised. As indicated above, it can only be a right of last resort; for an unlimited right on the part of Member States to withhold contributions at will, on the basis of a mere claim that in their view the expenditures concerned had been improperly incurred, not only could speedily cause serious disruption, but would also give those Member States which, on the basis of the normal scales of apportionment, are major contributors, a degree of control and veto over the affairs of the United Nations which, equally, can never have been intended in the framing of the Charter to be exercised by these means, or Article 17, paragraph 2, would not be there.

This brings me to the second element in the solution propounded by the Court, and on this aspect of the matter I can concur. The solution is not technically a final one, for as things are at present, means continue to be lacking whereby, in the case of controversy, a decision binding both on the Organization and on Member States can be obtained. In practice the proposition involved will help towards producing a *de facto* solution. To state it in my own way—when, on the basis of an item which has been regularly placed on the agenda, and has gone through the normal procedural stages, the Assembly, after due discussion, adopts by the necessary two-thirds majority, a resolution authorizing or apportioning certain expenditures incurred, or to be incurred, in the apparent furtherance of the purposes of the Organization, there must arise at the least a strong *prima facie* presumption that these expenditures are valid and proper ones. Unless that is so, a potentially unworkable situation exists; but clearly it must be so, and in consequence (subject to the points discussed in Section VIII below), an apportionment by the Assembly has, initially at least, the effect that Member States become obliged to pay their apportioned shares. This is because, if such a presumption arises, it must in principle continue to exist unless and until it is rebutted and the contrary position is established, by whatever means it may be practicable to have recourse to—any consequential financial adjustments being effected later. Only if

[6] It is often said that there is a safeguard in the fact that, under Article 18 of the Charter, financial resolutions require a two-thirds majority (though even so, a possible minority of about 35-40 States would be a serious matter). But what Article 18 actually mentions is not "financial resolutions", but "budgetary questions". Does this mean simply the ordinary budget and the expenses included in it? If the expression did *not* include other expenses, then the Assembly could in several classes of cases, by a bare majority vote, impose financial liabilities on a minority of over 50 States—which in a few years may be one of over 60 States.

the invalidity of the expenditure was apparent on the face of the matter, or too manifest to be open to reasonable doubt, would such a *prima facie* presumption not arise.

V

It is now necessary to consider the first of the questions mentioned in the second paragraph of the preceding Section; for the simple fact that expenditures are valid, or anyhow not invalid, does not necessarily, or of itself, make them "expenses" of the Organization. It depends on what is properly to be understood by the notion of an expense. To give a quick illustration, it could be argued (I shall discuss the merits of the argument later) that while expenditures incurred in the discharge of functions which the Organization has a duty under the Charter to perform (for instance the functions of a peace-keeping character involved in the present case) are unquestionably in the nature of expenses, expenditures incurred in the performance of activities of a merely permissive kind, which the Organization has a faculty, but no positive obligation, to carry out, do not have that character, although they might be perfectly proper expenditures. In cases coming under the latter head, therefore, it might be contended that if the Organization decides upon such an activity, it must look to voluntary contributions from Member States, or other sources of income available to it, in order to finance the activities [7], and cannot claim contributions as a matter of *obligation* under Article 17, paragraph 2, of the Charter.

Another illustration would be if, at the invitation of one or more Member States (as can happen), the Organization engaged in some activity, or assumed some function, quite outside the normal scope and framework of the Charter. Such action would not be illegal if it was carried out with the consent of all the States affected by it; nor would the resultant expenditures be invalid. But they would, *ex hypothesi*, not be expenditures contemplated or provided for by the Charter. Despite their "non-invalidity" therefore, they could not rank as "expenses of the Organization" within the meaning of Article 17, paragraph 2, to which all Member States would be obliged to contribute, irrespective of how their votes had been cast in relation to the resolutions authorizing the expenditures in question. Member States cannot, in my opinion, be bound to contribute to expenditures incurred outside the scope and framework of the Charter (even if these are not illegal *in se*), except by their specific consent given *ad hoc* in relation to the particular case. Article 17, paragraph 2, does not, as such, extend to such a case. "Non-

[7] This is what in fact occurs in many cases—see as indicated in footnote 5 above.

invalidity" does not therefore, in my view, suffice *of itself* to give rise to an obligation to contribute to given expenditure as an expense of the Organization, irrespective of various other factors which I shall discuss in due course. The validity of the expenditure and the obligation to contribute to it are two distinct questions. Validity is a condition of the obligation: it is not necessarily a sufficient condition.

Equally, if the matter is looked at in a more general way, it is not the case that the *genus* "expense" can be simply equated with "expenditure" or "disbursement", i.e. anything that is in fact paid out. In the technical sense, and in the normal acceptation of the term, "expenses" are expenditures of a kind which, under private law, would be "recoverable". For instance, in contracts of employment, it is very usual to find a clause saying that the employee will receive such and such a salary, "plus expenses"; but it is well understood that this does not mean any and all *disbursements* or expenditures the employee may choose to make in the course of carrying out his functions, but only such as are reasonable and necessary, and have been incurred in the normal course of business. This is really inherent in the whole idea of an expense, and must be read into Article 17, paragraph 2, despite the absence of any express qualification; for after all, the Organization, by apportioning the expenditures concerned, is, in effect, seeking to recover them from the Member States.

Taking account of these considerations, an attempt can now be made to ascribe some content to the notion of "expenses of the Organization". The Court has declined to give any *definition* of this term. I agree that a definition as such is not called for, and would in any case be difficult. But short of a definition, I think it useful to indicate the main types of expenditures which, assuming them to be valid and legitimate, would fall within the normal conception of what constitutes an expense, and would therefore be "expenses of the Organization". Such expenditures would, it seems to me, include the following (I will simply indicate them without giving any reasons, as these are self-evident):

A. All those expenditures, or categories of expenditures, which have normally formed part of the *regular* budget of the Organization, so that a settled practice *(pratique constante)* of treating them as expenses of the Organization has become established, and is tacitly acquiesced in by all Member States.

B. *In so far as not already covered by head A:*
   I. administrative expenditures;
   II. expenditures arising in the course, or out of the performance by the Organization of its functions under the Charter;

III. any payments which the Organization is legally responsible for making in relation to third parties; or which it is otherwise, as an entity, under a legal obligation to make; or is bound to make in order to meet its extraneous legal obligations.

In head B II however, the words "... arising ... out of the performance by the Organization of its functions under the Charter" conceal a difficulty which will be discussed in the last Section of this Opinion; and in any event these words do not include the case noticed above, where the Organization may, by invitation, engage in activities, or assume functions, outside the scope and framework of the Charter, even if, by reason of such invitation, no illegality arises. Action outside the Charter can well not involve any breach of general international law; and even if it otherwise would, may be validated in various ways. It does not thereby become *Charter* action, or the expense of it a Charter expense attributable to Member States.

VI

I come now to the third and last of the questions mentioned in the second paragraph of Section IV above, which is the one that has caused me the most difficulty in this case. It is not dealt with in the Opinion of the Court, because the Court has proceeded on the basis that once it is established that certain expenditures constitute "expenses of the Organization", it follows necessarily and automatically that every Member State is obliged to pay its apportioned share of these expenses *in all circumstances*. It can however, or it may be argued, that there are circumstances in which this would not be the case; and it seems to me essential to state, and to deal with this argument, if only to indicate how far and in what respects it is incorrect. Just as, in my view (see Section V), the notions of "validity" and "obligation to contribute" are not necessarily coincident, so also is it to me far from automatically self-evident that the notions of "expense" and "obligation to contribute" are *ipso facto* identical, though they are clearly closely related. I must therefore examine the matter.

Before coming to grips with this problem however, it is necessary to notice certain peculiarities about Article 17, paragraph 2, and to consider what is the exact role played by that provision in the financial set-up of the United Nations.

It is always a useful exercise when the interpretation of a given provision in the context of a whole instrument is in question, to consider what difference it would make if that provision did not figure in the instrument at all. It is only necessary to ask what the

position would have been if Article 17, paragraph 2, had not in fact been inserted in the Charter, in order to see at once that the obligation of Member States collectively to finance the Organization, by one means or another—the obligation of *principle* that is—cannot be dependent on the existence of Article 17, paragraph 2. It must in any case arise as a matter of inherent necessity. An Organization such as the United Nations cannot function without funds, and there is no other quarter from which, *as a matter of obligation* (and nothing short of obligation suffices) funds could come, except from the Member States themselves. Without finance, the Organization could not perform its duties. Therefore, even in the absence of Article 17, paragraph 2, a general obligation for Member States collectively to finance the Organization would have to be read into the Charter, on the basis of the same principle as the Court applied in the *Injuries to United Nations Servants* case, namely "by necessary implication as being essential to the performance of its [i.e. the Organization's] duties"—(*I.C.J. Reports 1949*, at p. 182). Joining the Organization, in short, means accepting the burden and the obligation of contributing to financing it.

Clearly, the independent character of the financial obligation of Member States—the fact that it has a basis extraneous to Article 17, paragraph 2—considerably strengthens the view, first, that the obligation does exist, and secondly that it exists at least to the extent necessary to make the Organization workable. So much is scarcely open to doubt. What might however (and in my opinion, for reasons to be indicated, would) be open to controversy, is the exact nature and extent of that obligation, and how it is to be carried out. In this connection, the fact that Article 17, paragraph 2, does duly figure in the Charter is of importance; nevertheless the light in which this provision has to be looked at may be affected by the existence of the independent obligation of principle, and this aspect of the matter must now be considered.

Were it not for the records of the San Francisco Conference for the drafting of the Charter (to which I shall refer later) the correct interpretation of Article 17, paragraph 2, would be that it added nothing to the already existing inherent obligation, and went solely to the mechanics of the performance of that obligation. It is worded so as to assume or imply the basic obligation rather than to create or express one, as it would do if for instance it read "The expenses of the Organization shall be borne by the Members, *and shall be borne by them* as apportioned by the General Assembly". The italicized phrase is not however there, with the result that Article 17, paragraph 2, is elliptical, and declaratory rather than constitutive of the basic obligation. Having regard to the independent foundation and inherent nature of the financial obligation of Member States, it would seem that the only real additional substantive effect of this provision (taken by itself and without reference to the *travaux*

préparatoires, as is the normal initial approach to any interpretative task) is to indicate the organ, namely the General Assembly, which is to decide on the *apportionment* of the expenses as between the Member States, and also to make it clear that these States must accept the apportionment so determined. This view of the effect of Article 17, paragraph 2, if that provision is considered *per se*, is further supported by the points mentioned in the footnote hereto [8]. Consequently it seems to me incorrect to say, as has sometimes been suggested, that the exercise of the power of apportionment by the Assembly creates the obligation. This is surely putting the cart before the horse. Apportionment is merely a condition precedent of the obligation having to be carried out. It quantifies the content of it; but the obligation itself is an antecedent one, and without it, the apportionment would lack legal effect, or would amount merely to an invitation to contribute the indicated share on a voluntary basis.

It follows, in my opinion, that there is a sufficient element of ambiguity about the exact intention and effect of Article 17, paragraph 2, to make its interpretation on the basis of the rule of the "natural and ordinary meaning" alone, unsatisfactory. In these circumstances it is permissible to have recourse to the preparatory work of the San Francisco Conference. Reference to this source indicates that the words "shall be borne by the Members as apportioned by the General Assembly", rather than some phrase such as "shall be allocated to the Members in such shares as the Assembly may determine", were deliberately employed with the object of ensuring that what was called "a clear statement of the obligations of Members to meet the expenses of the Organization" should be found in the Charter itself — (Document 194 in the Dossier supplied

[8] Whereas no express provision was necessary in order to *create* a general liability of principle for Member States to bear the costs of the Organization, which would have existed in any case as a matter of inherent necessity, an express provision did have to be introduced in order to provide for the method of apportionment; and also to oblige Members to pay the share allocated to them, and not assert a right to pay a smaller share. Without an express provision on these points there would have been endless debate, and no organ of the United Nations would have been invested with any clear right of decision. In exactly the same way, the *first* paragraph of Article 17 is also essential, in order to make it clear that it is the Assembly, and not some other organ, such as the Security Council, which adopts the budget of the Organization. The lack of corresponding provisions in the Covenant of the former League of Nations led to great difficulties in the early years of the League, and eventually necessitated an amendment of the Covenant. A further indication that Article 17 is directly concerned with the mechanics of the obligation to contribute, rather than with the obligation itself, is afforded by the fact that it figures in Chapter IV of the Charter, which deals with the functions of the General Assembly. If the main purpose of the Article was to make clear the responsibility of Member States for bearing the costs of the Organization, it should have figured in some more general chapter, and not among the functions of the Assembly. Without reference to the San Francisco records, the deduction would be that the subject of the Article was the financial powers of the Assembly rather than (except indirectly) the obligations of Member States.

to the Court by the Secretary-General of the United Nations, pp. 9-13, *passim*) [9]. If the language used was not in fact very apt for the purpose of embodying such a "clear statement", the existence of the intention at any rate is clear, and for reasons which I shall presently give, it is important that there should be no doubt about that intention.

VII

I propose now to consider the difficulty I mentioned earlier—the question whether, if given expenditures are duly expenses of the Organization, an obligation for every Member State to contribute to them as apportioned arises in all circumstances. The core of the difficulty is how to reconcile the obligatory character of the liability to meet the expenses of the Organization with the non-obligatory character of many, indeed most, of the resolutions under which these expenses are incurred. To me, it has not seemed self-evident that Article 17, paragraph 2, on its actual wording, necessarily or automatically disposes of this difficulty; and unless it can be disposed of satisfactorily, the affirmative reply given to the question addressed to the Court must be less convincing than it ought to be.

There is clearly no problem in the case of *decisions* of the Security Council which, under Article 25 of the Charter, are binding on Member States, even on those Members of the Council which voted against them, and equally on those Members of the Assembly which, not being Members of the Council, *ex hypothesi* did not vote at all. Therefore, even in the absence of Article 17, paragraph 2, all these Member States would be obliged to meet the expenses of carrying such decisions out. But many Security Council resolutions only have a recommendatory intention and effect, and this is in principle also the case with most Assembly resolutions. If however a Member State has voted in favour of such a resolution, or, by abstaining, has not manifested opposition to it, it is reasonable to regard either of these attitudes, not indeed as involving any formal obligation for that Member State itself to carry out the resolution, operationally, but as indicating approval of, or at any rate tacit acquiescence in, its being carried out by those Member States which are ready to do so; and also (and quite apart from Article 17, paragraph 2) as implying willingness to contribute to the expenses of carrying it out—although as regards the effect of abstentions, it would be better to put the matter on the basis that a Member State which does not vote *against* a given resolution, can scarcely object if it is called upon to pay its share of the resultant expenses.

[9] It is also clear from the records that the inappropriateness of putting the basic financial obligation of Member States amongst the functions of the Assembly was realized. It was apparently left there because no better place could be found for it.

Similar considerations can hardly apply to the case of a vote which does go to the length of being cast against the resolution concerned—a resolution which is in any case purely recommendatory. Certainly it would seem at first sight an odd position that a Member State which is not itself bound to carry out such a resolution, and which has manifested disapproval of its being carried out at all by anyone, should nevertheless be legally obliged to contribute to the expenses of executing it. Here therefore is a case in which, in order to justify the conclusion that a Member State in this position is nevertheless bound to contribute its apportioned share, reliance on the inherent obligation of Member States to meet the costs of the Organization might not be sufficient; for that obligation is an obligation of principle only. It would not necessarily extend to or cover every case. A Member State which had voted against a resolution having only a recommendatory effect could, in the absence of express language figuring, or to be deemed to figure, in the Charter itself, very plausibly argue that the obligation did not exist for it in the particular case, especially with reference to certain types of activities—(see Section VIII below). It is therefore important that the records of the San Francisco Conference—even if the language used for the purpose was not particularly felicitous—do indicate that the intention to impose a definite financial obligation on Member States was there. Looking at the matter as a whole, I think that (with the possible exception of the class of case considered in Section VIII below) this intention must be deemed to have extended to covering the payment by Member States of their apportioned shares, irrespective of how their votes were cast on any given occasion, at any rate as regards all the essential activities of the Organization, and even if they have no formal legal obligation to join in carrying out the activities to which the given expenditures relate. (In the case of inessential activities, the position is more complicated, and I consider this in the final section of this Opinion.)

In reaching this conclusion, it is material to take account of the following factor: those who framed the Charter deliberately broke away from the fundamental voting rule of the former League of Nations (unanimity—see Article 5, paragraph 1, of the League Covenant), and they adopted for the United Nations a majority voting rule. In an Organization which has never numbered much less than 50-60 Member States, and now numbers over 100, no other rule than a majority one would be practicable. But a majority voting rule is meaningless unless, although the States of the minority are not formally bound as regards their own action, they at least cannot prevent or impede the action decided on from being carried out

aliunde. This they obviously could do if they had a species of veto, the exercise of which, through the refusal to contribute financially, would enable them to prevent or seriously impede the action concerned.

The same conclusion can be reached in another way, for if there is, on the one hand, a general position under the Charter according to which certain resolutions have no formally obligatory character—doubly not so for those who vote against them—there is also, on the other hand, a special provision, Article 17, paragraph 2, obliging Member States to contribute to the cost of carrying these resolutions out, in so far as these costs duly rank as expenses of the Organization. To this situation the rule *generalia specialibus non derogant* must apply, so that in spite of the general element of non-obligation under these resolutions, the special obligation to contribute to the expenses incurred in carrying them out prevails, and applies even to Member States voting against. There is in short no substantive conflict.

This position was aptly compared, by one of the representatives of Governments at the oral hearing, to that of a member of the public who cannot be compelled physically to join in constructing a public edifice but can, through the medium of ordinary taxation, be made to contribute to the cost of having it constructed by others. Another comparison, perhaps even closer, would be that of membership of a club. If the Committee or governing body of a club decides to acquire additional premises, or to extend the club's activities, or otherwise to increase expenditure, and this necessitates raising the annual subscription, or in some other manner involves financial liabilities for members, and this decision is ratified by a general meeting of the members, the latter, irrespective of how they voted, must pay accordingly, or resign their membership.

VIII

I have mentioned the existence of a class of case to which, possibly, the foregoing considerations would not apply, and regarding which there may be room for some real doubt whether any financial obligation can arise, at least for Member States voting against the resolution concerned in any given case. In the normal case, a resolution provides for certain action to be taken by the Organization, either through such of the Member States as are willing to participate, or through the medium of the Secretary-General or of some other agent or agency. In these cases, despite the obligation to contribute to the resultant expenses, the resolution retains its fundamentally non-obligatory character; for if the Member States are obliged to contribute financially, they are not

obliged to participate in the operational carrying out of the substantive activities provided for in the resolution. Where however the "action" to be taken under the resolution consists *solely* of provision for making a payment or financial contribution (e.g. for some purpose of aid or relief), so that the making of this payment or contribution is not merely a means to an end—viz. enabling the resolution to be carried out—but the end itself, and the sole object of the resolution, it is evident that if the payment or contribution concerned is to be treated as one to which even Member States which voted against the resolution must contribute by reason of Article 17, paragraph 2, the resolution acquires in practice a wholly obligatory character—since it does one thing only, and Member States are bound, or would be bound, to do or contribute to doing that one thing. In this connexion, it is significant that the actual *practice* of the Assembly (and the Court has drawn considerable inspiration from this source), has been to finance expenditures falling within this class of case, mainly by calling for *voluntary* contributions from Member States. Examples are the activities (or most of them) for which budgetary provision is made under such heads as those of "Trust Funds" and "Special Accounts"—for instance the U.N. Special Fund, UNKRA, UNSCO, EPTA, UNRWA, UNICEF, the U.N. Fund for the Congo, and the U.N. Congo Famine Fund. No doubt special considerations applied in some of these cases; still, the fact remains that contributions were not claimed as a matter of actual obligation.

The same point arises in another way, in relation to head B II in the list of expenditures ranking as expenses of the Organization given at the end of Section V above. What expenditures precisely should this head B II be regarded as covering? There are broadly two main classes of functions which the Organization performs under the Charter—those which it has a duty to carry out, and those which are more or less permissive in character. Peace-keeping, dispute-settling and, indeed, most of the political activities of the Organization would come under the former head; many of what might be called its social and economic activities might come under the latter. Expenses incurred in relation to the first set of activities are therefore true expenses, which the Organization has no choice but to incur in order to carry out a duty, and an essential function which it is bound to perform. Therefore the principle enunciated by the Court in the *Injuries to United Nations Servants* case, and mentioned earlier, applies: the Organization "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties" (citation on p. 208 above). Even without Article 17, paragraph 2, the Organization could require Member States to contribute to these expenses.

It is less clear that any similar power exists to require Member States to meet the costs incurred in performing merely permissive activities carried out under non-binding resolutions. There certainly would be no such power without Article 17, paragraph 2—at least not as regards Member States which voted against the resolution giving rise to the expenditure concerned; and even with the assistance of Article 17, the position is not entirely clear. There is a definite distinction, inasmuch as where the activities involved are such as the Organization has a duty to carry out, non-contribution by a Member State would be fundamentally inconsistent with that State's membership, as being calculated to prevent or gravely impede the performance by the Organization of an essential function. Where the costs of permissive, or non-essential activities are concerned, there is no correspondingly clear-cut inconsistency, and there must remain a question whether, in this type of case, Article 17, paragraph 2, is sufficient to give rise to a financial obligation *for the dissenting voter*. If it is sufficient, then it would follow that, in theory at least, the Assembly could vote enormous expenditures, and thereby place a heavy financial burden even on dissenting States, and as a matter of obligation even in the case of non-essential activities. This would be reading a lot into such a provision as Article 17, paragraph 2. In this connexion, it must be borne in mind that, if a two-thirds majority is required for the adoption of financial resolutions, the present scales of apportionment cause a major part of the resulting contributions to fall on a comparatively small minority of the Member States. As has already been mentioned, the existence here of a genuine difficulty seems to have been recognized in practice within the Organization, inasmuch as the cost of a large part of these permissive activities is met from voluntary contributions [10].

To set against these considerations, there is the fact that it would not be easy to draw a hard and fast line between necessary, essential and obligatory functions of the Organization, on the one hand, and merely optional, non-essential and permissive ones on the other. Changing concepts also are involved. Today, the humanitarian and aid-giving functions of the Organization are, if less imperative,

[10] I have already given it as my view (see Section V above) that no financial obligation arises where the Organization acts outside the ambit of the Charter, even if (because it has been invited to do so, and confines its action to consenting States) no illegality is involved. But in these cases, the lack of obligation derives not so much from the casting of a contrary vote, as from the fact that, in my opinion, the expenditures involved would not properly speaking be "expenses of the Organization" within the meaning of Article 17, paragraph 2, at all.

hardly less important than its political functions, and may well contribute materially, or even be essential, to the success of the latter.

For the purposes of the present Request it is not necessary to express any final view about these points, but I have thought it useful to draw attention to them. There is moreover at least one case of this kind as to which I feel no doubt about the obligation to contribute, irrespective of how a Member State's vote has been cast. It has been suggested by some of those who deny all validity to peace-keeping activities organized by the Assembly, that (on the analogy, as I suppose, of the well-known Prize Law doctrine of "infection") even *civil* expenditures in the nature of technical assistance, famine relief, etc., given to any country contemporaneously and in connexion with such peace-keeping activities (as is the case under some of the resolutions now involved) become, by a process of association, "tainted", as it were, with the same invalidity as is alleged to exist for the peace-keeping activities themselves. I take a view which is the exact antithesis of this, and applies the doctrine of "infection" in reverse. Even if it should be the case (and on this I do not express any final view) that there is no positive obligation to contribute to the expenses of carrying out social and economic activities of a permissive character (except for Member States supporting or not opposing the activity concerned), I consider that where such an activity is closely connected with, arises out of, and, in short, is basically part of a peace-keeping endeavour, and necessary for, or directly contributory to the success of that endeavour, the activity in question takes on the nature of an essential activity, the expenses of which are expenses of the Organization to which all Member States are bound to contribute, irrespective of their votes.

Consequently, my concurrence in the Opinion of the Court extends no less to the civil than to the military expenditures incurred under the Resolutions specified in the Request.

(Signed) G. G. FITZMAURICE.