

DISSENTING OPINION BY JUDGE KORETSKY

I regret that I cannot agree with the Opinion of the Court both (a) as I do not consider that the Court would and should give an opinion on the given question posed to it by the General Assembly of the United Nations, and (b) as the Court, to my mind, did not come to the acceptable conclusion in relation to the question which in substance is a question of financial obligations of Member States in peace-keeping operations.

1. To give an Advisory Opinion on the question "do the expenditures authorized in General Assembly resolutions [numbered in its request] constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?" is impossible without an appraisal, from the point of view of validity, "charterability", of the named resolutions.

The French delegation proposed an amendment to the draft of the given resolution: to include the words: (The expenses ... "decided on in conformity with the Charter" (A/L 378)). The amendment was rejected. In this connection the following question arises: is the Court to be precluded from giving an advisory opinion without entering into the question of conformity of the resolutions with the Charter? The Court's Opinion says "No" referring to "the clear statements of sponsoring delegations that they took it for granted the Court would consider the Charter as a whole". Generally speaking, an interpretation of sponsors of a given resolution after it was adopted does not always have a decisive significance. But even if we might equate the phrase "that the Court may consider the Charter as a whole" to "leaving it to the Court to examine whether the resolutions are in conformity with the Charter", then may we consider that the situation is as if the amendment was approved or—what is the same to say that the General Assembly had no grounds to reject the amendment—as if by that expression (to consider the Charter as a whole) the Court were invited to ignore the voting of the Assembly on the French amendment. The phrase mentioned in the Opinion was pronounced by one of the sponsors of the resolution in the Fifth Committee before the French amendment was proposed. The amendment was submitted later—in the plenary meeting of the Assembly. In the plenary meeting (A/P.V. 1086) even sponsors spoke in a different way—that the adoption of the amendment would "compel the Court to consider the validity of a large number of resolutions adopted by the General Assembly itself", that it "calls into question every resolution", that it "raises a political issue, the legality of action taken by the General Assembly in implementation of decisions of the Security Council".

So it was apparently considered that the Court must, *pro veritate habetur* the resolutions of the General Assembly, proceed on the presumption of their validity, of a kind of "infallibility" of the General Assembly.

2. The General Assembly in its request for an advisory opinion put to the Court the question connected with the resolutions already adopted and the expenses already effected. Hence the Court, in answering the question, would give, instead of answering the question in the form of principle, based on an interpretation of the Charter, a quasi-judicial appraisal of the effected expenses, some kind of judgment as if it had before it a concrete case about effected expenses.

3. The question posed to the Court, in spite of its apparent narrowness, involves more than an interpretation of only one Article and even of one paragraph of that Article (Article 17 (2)). As was stated by the Mexican delegate, the problem would not be regarded as basically a budgetary one; there was, rather, a basic constitutional problem. Political issues prevailed over juridical considerations. First and foremost we have there a political question, the question of financial policy in peace-keeping matters and, connected with it, a question of the powers and responsibilities of the principal organs of the United Nations, the political essence of which can hardly be denied. As the political aspect of the question posed to the Court is the prevailing one, the Court, to my mind, ought to avoid giving an answer to the question on the substance and ought not to find unwillingly that its opinion may be used as an instrument of political struggle. I think that there are "compelling reasons" for not giving an answer on the substance of the request of the General Assembly as "the circumstances of the case are of such a character as should lead it to decline to answer the request" (*I.C.J. Reports 1950*, p. 72).

The Court embarked on a different course. I am obliged therefore to follow the Court and examine also the substance of the posed question. I find it necessary to examine the history of the resolutions numbered in the request. In that way it is easier to come to the right conclusion.

4. The Opinion of the Court pays much attention to the description of the functions of UNEF as set forth in the resolutions of the General Assembly. It accepts the creation of the United Nations Emergency Force as something that can be based on the Charter, strives to soften the military purpose of this Force by denying the fact that it has been set up for "enforcement action"

and stating that it corresponds to the measures provided by Articles 11 and 14 of the Charter.

On this basis, the Court reaches the conclusion that the expenses for the United Nations Force must be considered as those provided by Article 17 of the Charter and allocated according to paragraph 2 of this Article.

The Court illustrates all this by the resolutions approved by the General Assembly, quoting some paragraphs of these resolutions. The Opinion states that the resolutions about the functions of UNEF have been approved without a dissenting vote, and at the same time it states that the question of the financing of UNEF presented perplexing problems in the debates of these problems and that the resolutions reflected "the uncertainties and the conflicting views about financing UNEF".

5. The Opinion did not consider it necessary to go into details about the contradictions, statements and positions of the delegations, limiting itself to quoting some paragraphs of the resolutions and paying much attention to the quotations of the Secretary-General's statements and reports.

This can be partly explained by the fact that in the General Assembly's resolutions, as was the case with resolution 1001 (ES-I), the reference is often made to that or those "guiding principles for the organization and functioning of the United Nations Emergency Force as expounded in paragraphs 6 to 9 of the Secretary-General's report", to "the definition of the functions of the Force as stated in paragraph 12 of the Secretary-General's report" to "the basic rule concerning the financing of the Force laid down in paragraph 15 of the Secretary-General's report" a.s.o. Thus the recommendations on the measures to be taken have been made not by the Member States but by the Secretary-General.

The mere formula of referring the expenses of the United Nations Force to paragraph 2 of Article 17 originated in the Secretariat. The Secretary-General, who "shall be the chief administrative officer of the Organization" (Article 97), has proved to be an instrument directly influencing United Nations policy.

6. It seems to me necessary to follow more critically the course of development of the provisions of the General Assembly's resolutions, considering them from an angle somewhat different from the Opinion of the Court.

7. As has been done in the Opinion of the Court, one should naturally begin with resolution 997 (ES-I) of 2 November 1956.

The General Assembly, stating there that foreign armed forces "have penetrated deeply into Egyptian territory" and "are conducting military operations against Egyptian territory", appealed to:

1. "All parties now involved in hostilities in the area agree to an immediate cease-fire and as part thereof, halt the movement of military forces and arms into the area";
2. "the parties to the armistice agreements ... to observe scrupulously the provisions of the armistice agreements";
3. recommended "that all Member States refrain from introducing military goods in the area of hostilities...", and finally,
4. it has asked the Secretary-General "to observe and report promptly in compliance with the present resolution to the Security Council and to the General Assembly..."

In these resolutions, which in their nature are nothing else but recommendations, one cannot yet see anything contradicting the Charter.

But in the Opinion of the Court the attention is drawn to the words in paragraph 5 which state that the Secretary-General has been asked to report to the General Assembly "for such further *action* as they may deem appropriate in accordance with the Charter".

The Court's Opinion stresses the words "action as they may deem ...". It tries to make the word "action" especially important and justifies with this word the creation of the United Nations Emergency Force.

Quite apart from the fact that by a UNO resolution approved even without a dissenting vote one cannot change the Charter, still it should be pointed out that in this very resolution the word "action" is subordinated to the possibility of implementing it "in accordance with the Charter".

And in accordance with the Charter the General Assembly in the problems relating to the maintenance of international peace and security may only *discuss* and *make recommendations*. This recommendation in some cases may be considered as an "action" in its common meaning, but it is not an "action" within the meaning of Article II (2) of the Charter. The words "action" and "recommendation" are not identical.

But the expression "to report to the Security Council *and* to the General Assembly", while mentioning the word "action" expressed the wish of some States, if not to put aside the Security Council in any case to make the Security Council equal to the General Assembly regarding the function of maintaining international peace and security.

8. The resolution 998 (ES-I) of 4 November 1956 has immediately revealed it. It has violated the Charter, turned "a dangerous corner" in requesting the Secretary-General to submit "a plan for the setting up ... of an emergency international United Nations Force to secure and supervise the cessation of hostilities in accordance with all the terms of the aforementioned resolution" (997 (ES-I)).

Here we can see two violations of the Charter:

1. The General Assembly has entrusted the Secretary-General to secure the cessation of hostilities, i.e. entrusted him to take an action within the meaning of the Charter. The Court in its Opinion assures that the verb "secure" as applied here "might suggest measures of enforcement were it not that the Force was to be set up with the consent of the nations concerned". "The consent" means that they ought not to be forced to give such a consent. But the United Nations Armed Force has to be ready to maintain (i.e. to enforce) the preservation of conditions, to which the parties concerned gave their consent.

2. The General Assembly has assumed a task of setting up the United Nations Force. One should state that the Charter does not include such a notion as a United Nations Armed Force. Even the Security Council itself is not authorized to set it up. Article 45 binds the Members to hold immediately available for urgent military measures national air force contingents for *combined* international enforcement action. This Article refers to Article 43. Article 43 says that "All Members of the United Nations ... undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities...". Armed forces which would be available to the Security Council would continue to be armed forces of the Members of the Organization and not those of the Organization. They must be relatively compared with the armies of some military alliance (coalition), which might act together or in close co-ordination, but do not form an army separate from the national armed forces. Article 42 of the Charter, mentioning action by air, sea and land forces, which the Security Council may take "to maintain or restore international peace and security" states that such action is being carried out by air, sea or land forces of Members of the United Nations and not by forces of the United Nations. Article 47 refers to "the employment and command of *forces*", and to "the strategic direction of any armed forces placed at the disposal of the Security Council".

9. Resolution 999 (ES-I), approved on the same day, authorized the Secretary-General "immediately to arrange with the parties concerned for the implementation of the cease-fire and the halting of the movement of military forces and arms into the area". But in order "to obtain compliance of the withdrawal of all forces behind the armistice line", it needed the force which would be capable of

securing the fulfilment of this task. The General Assembly suggested that the Secretary-General should apply for "the assistance of the Chief of Staff and the members of the United Nations Truce Supervision Organization".

10. And on that very day the Secretary-General, in compliance with resolution 998 (ES-I), presented his report on the plan for an emergency international United Nations Force (Doc. A/3289). In his report he considers that "the General Assembly should decide immediately on the establishment of a United Nations Command", declaring that he would try "to determine from which countries the necessary troops might be drawn without delay, as well as from which countries recruitment may be possible for a somewhat later stage", and that "as a matter of principle, troops should not be drawn from countries which are permanent members of the Security Council".

11. On the following day (i.e. 5 November 1956) the General Assembly, in its resolution 1000 (ES-I), repeating almost word for word the main proposals of the Secretary-General, established "a United Nations Command for an Emergency International Force to secure and supervise the cessation of hostilities...", and appointed the Chief of the Command, authorizing him to undertake the recruitment of officers in consultation with the Secretary-General.

12. One reads all that and wonders involuntarily whether Article 43 and especially Article 47 ever existed, in compliance with which there has been set up a Military Staff Committee "to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal...".

13. The Opinion uses quite a number of quotations from the Secretary-General's report of 6 November 1956 (Doc. A/3302). In his report the Secretary-General assured that the setting up of the Force must not be considered "as part of an enforcement action directed against a Member-country". "There is", he wrote, "an obvious difference between establishing the Force in order to secure the cessation of hostilities, with a withdrawal of forces, and establishing such a Force with a view to enforcing a withdrawal of forces."

Was then the United Nations Force only an observers' corps? In the Secretary-General's report it was stated that the United Nations Force is "more than an observers' corps". If it is "more" than that, then it is not simply "observers". And he acknowledged that the Force had military functions, but he added that this Force must not exceed the limits necessary to secure peaceful conditions. Such peaceful conditions might be secured by the mere "presence" in a dangerous area of the armed forces sent there in compliance with the Charter. But circumstances might compel the armed forces to

undertake "enforcement action". The Secretary-General himself acknowledged the fact that "the possibility that the Security Council could use such a Force within the wider margins provided under Chapter VII of the United Nations Charter" is not excluded.

Ergo, they were forces of compulsion, whether they were only "stationed" there, i.e. "supervised", or were acting, i.e. undertook "actions".

14. On 7 November 1956 the General Assembly in resolution 1001 (ES-I) continued on its "anti-Charter" way as recommended by the Secretary-General. It approved "the guiding principles for the organization and functioning of the Emergency international United Nations Force as expounded in paragraphs 6 to 9 of the Secretary-General's report", agreed with his definition of the functions of the Force, authorized him "to issue all regulations and instructions which may be essential to the effective functioning of the Force", requested "the Chief of the Command, in consultation with the Secretary-General as regards size and composition, to proceed forthwith with the full organization of the Force".

All these provisions were directed to performing "actions", which did not fall within the functions of the General Assembly. They cannot naturally be substantiated by the Charter. But the General Assembly made no reference to Articles of the Charter, as it is quite clear that Articles 11 and 12 of the Charter bar the way to the aforementioned decisions of the General Assembly.

The Opinion invites reference to Article 14 of the Charter, considering that "actions" undertaken in pursuance of decisions of the General Assembly might be considered as "measures" recommended under Article 14. But Article 14 has nothing to do with the question under discussion. It provides for quite different situations. If one considers that it involves "the maintenance of international peace and security", as stated by the Court, then there would be no need to include in the Charter before Article 14, Articles 11 and 12 which specially define the role of the General Assembly "in the maintenance of international peace and security". Besides, Article 14 provides that "the General Assembly may *recommend* measures for the peaceful adjustment of any situation". What kind of measures are they supposed to be? One may refer to Chapter VI and to Article 33 (1) in particular. The General Assembly may only recommend measures in distinction to the Security Council which may—as stated in that Article—"call upon the parties to settle their dispute by such means". To whom may the General Assembly recommend measures? To the Governments of the Member States

concerned. If they approve the recommendations, then they have to carry them out. The General Assembly cannot make recommendations to itself or to the United Nations staff. And in this case the General Assembly not only recommended these measures but brought and stationed the armed forces set up by it in the area where the military invasion had taken place, i.e. in Egyptian territory.

To consider that the recommendation of measures for the peaceful adjustment, referred to in Article 14, may be turned into the measures for securing "the cease-fire, withdrawal of troops and other matters related to the military operations in Egyptian territory" would have been, from a logical point of view, a deviation from the Charter and its provisions.

15. Citing the resolutions mentioned in the preceding paragraphs, the Opinion has deemed it necessary to mention several times that they were adopted without a dissenting vote. But it did not mention that in the statements of a number of delegations who considered it possible to abstain from voting, as indicated in the written and oral statements (p. 112) as well, the Delegation of the USSR made a statement in which it gave its reasons in detail for the view that it

"regards the proposal for the establishment by the General Assembly of an international force to be stationed on Egyptian territory, a proposal which bypasses the Security Council, as contrary to the United Nations Charter. However, in view of the fact that in this instance the victim of aggression has been compelled to agree to the introduction of the international force, in the hope that this may prevent any further extension of the aggression, the Soviet delegation did not vote against the draft resolution, but abstained."

This statement forces us to make another evaluation of abstention from voting. But this will be a matter for later discussion.

16. Resolution 1001 (ES-I) of 7 November 1956 opened the epic struggle for and against the anti-Charter methods of financing the so-called peace-keeping operations.

The General Assembly in this resolution confined itself to provisionally approving "the basic rule concerning the financing of the Force laid down in paragraph 15 of the Secretary-General's report".

I do not intend to consider whether this form of resolution of the General Assembly (which has been used in the three paragraphs of the resolution and has usually been found objectionable under domestic legislation) was apt. But it reveals the role played by the Secretariat in defining the methods of financing the armed forces and operations.

Despite the aforementioned paragraph 15 of the Secretary-General's report (Doc. A/3302), no final conclusion has yet been

reached on the procedure of financing the Force. The Secretary-General wrote that "the question of how the Force should be financed ... requires further study". But still he considered that "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".

There has not yet been any direct or indirect reference to Article 17 of the Charter.

In resolution 1122 (XI) of 26 November 1956 the General Assembly authorized the Secretary-General "to establish a United Nations Emergency Force Special Account to which funds received by the United Nations, outside the *regular budget* ... shall be credited...", but at the same time it authorized him "pending the receipt of funds for the Special Account, to advance from the Working Capital Fund such sums as the Special Account may require to meet any expenses chargeable to it".

This already constitutes a scarcely permissible utilization of the common funds of the United Nations. The Working Capital Fund was set up in the beginning in order to finance the provisional budget of 1946, pending receipt of contributions. And later on its purpose was to meet regular budgetary expenses, inasmuch as contributions were usually delayed. It was not designed to meet un-budgeted expenditures. That was why the General Assembly had no grounds for authorizing the Secretary-General to advance sums from the Working Capital Fund for financing the United Nations Emergency Force.

17. On 21 November the Secretary-General presented to the General Assembly his new report (Doc. A/3383 and Rev. 1) in which he wrote that he "considers it essential that the General Assembly decide at any early date on the method of allocating to Member States the costs of the Force to be financed by the United Nations" and recommended ("in order to assist the General Assembly in considering this question") the approval of a resolution "that the expenses of the Force be allocated to Member States on the basis of the scale of assessments to be adopted for the United Nations budget for 1957".

At the meeting of the Fifth Committee on 3 December 1956 (A/C. 5/SR. 541) the Controller, reporting on the above-mentioned proposal of the Secretary-General, made by him with regard "to the views expressed *informally* by a number of delegations", could not but mention that "from a *strictly budgetary and accounting viewpoint*, the expenses of the Force might be treated as *distinct* from the regular annual appropriation for financing United Nations activities". But, he added, "they nevertheless remained United Nations expenditures within the general scope and intent of Arti-

cle 17 of the Charter”.

Thus, Article 17 was brought into action for getting funds for operations beyond the Charter.

The General Assembly in resolution 1089 (XI) of 21 December 1956 has recorded that it took into consideration the recommendation made by the Secretary-General “that the expenses relating to the Force should be apportioned in *the same manner* as the expenses of the Organization”, but it could not fail to draw attention to the still growing controversies and to the fact 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”, and decided “that the expenses of the United Nations Emergency Force, other than for such pay, equipment, supplies and services as may be furnished without charge by Governments of Member States, shall be borne by the United Nations and shall be apportioned among the Member States, to the extent of \$10 million, *in accordance* with the scale of assessments adopted by the General Assembly for contributions to the annual budget of the Organization for the financial year 1957”, and set up a Committee “to examine the question of the apportionment of the expenses of the Force in excess of \$10 million ... including the principle or the formulation of scales of contributions *different* from the scale of contributions by Member States to the *ordinary* budget for 1957”.

In this resolution there is no mention of Article 17. It did not equate, as the Secretary-General proposed, an apportionment of the expenses relating to the Force to an apportionment of the expenses of the Organization, but only compared them, drew an analogy between them, using the expression “in accordance with”.

The General Assembly requested that the question of the apportionment of the expenses of the Force should be further studied, directing the Committee to look for an eventual principle and a formula of different scales of apportionment. And in all these researches, hesitations and unreconciled divergent views one could clearly distinguish the difference of principle between budgetary expenses and the expenses for the armed forces which stood beyond the limits of the budget and even of the Charter itself.

It should be stressed that the General Assembly did not exclude the possibility of any “subsequent determinations as to responsibilities for situations leading to the creation of the United Nations Emergency Force and to ultimate determination as to claims established as a result of expenses arising in connection therewith”.

18. In resolution 1090 (XI) of 27 February 1957 the General Assembly again returned to the question of financial arrangements

for the United Nations Emergency Force. The allocated sums would be quickly exhausted.

The General Assembly assumed that "the expenses of the Force already approved for 1957 represent a sizeable increase in assessments placed on Member States, causing a grave unanticipated financial burden for many Governments", but it decided "to enter into commitments for the Force up to a total of \$16.5 million", appealed to Member States to make voluntary contributions, permitted the borrowing of sums from the Working Capital Fund and even from "other funds under the control of the Secretary-General" (though the rightfulness of that is doubtful).

But still the General Assembly did not find the appropriate basis for the financing of the Force.

19. The expenses for maintaining the United Nations Force continued to grow. The terms of the stationing of the military contingents were prolonged. The financial claims of Members contributing troops were also growing.

The General Assembly by resolution 1151 (XII) of 22 November 1957 once again increased the supplementary allocations to \$13.5 million, and even to \$25 million.

The Secretary-General reported to the General Assembly (Doc. A/3694) that "a number of Member States have notified the Secretary-General that they will not participate in the financing of the Force for reasons stated, when the relevant decision was taken by the General Assembly. The percentage assessments of the States involved amount to a total of approximately 20 per cent."

The resolution passed over this statement and almost repeated the formula of resolution 1089 (XI), which provided that the expenses shall be borne by the Members of the United Nations *in accordance with* the scales of assessments adopted by the General Assembly for the financial years 1957 and 1958 respectively.

20. On 27 August 1958 the Secretary-General presented a report to the General Assembly in which he summarized the activity of the United Nations Emergency Force and its financing position. He wrote that contributions had been very badly assessed and that on 31 July 1958 only 41.1 per cent. of the total amount assessed for 1958 had been received, and sixty-two Members had made no payment of their 1958 UNEF assessment at that date and that "certain Members have reiterated their intention not to participate in the financing of the Force". All this (taking into consideration that regular budgetary contributions have been made more or less normally) was a kind of protest, whether direct or silent, against the adopted methods of financing.

The Secretary-General strove to achieve stand-by financial arrangements. He considered that it should be established that the

costs for the United Nations operations of the type in question, based on decisions of the General Assembly or the Security Council, should be allocated in accordance with the normal scale of contributions.

In reply, the General Assembly adopted resolution 1263 (XIII) of 14 November 1958 in which it limited itself to requesting the Fifth Committee "to recommend such action as may be necessary to finance the continuing operation of the United Nations Emergency Force".

21. By that time the three main positions on the question of the method of financing the expenses of the Force (Doc. A/4072) had been crystallized:

- (a) The costs of the Force should be borne by all Member States on the basis of the regular scale of assessments, and Article 17 of the Charter should be applied to them;
- (b) the application of the regular scale of assessments for the costs of the Force was not equitable and therefore it was suggested, while sharing the expenses of the Force, to take into consideration: (1) the special responsibility for the maintenance of peace and security of the permanent members of the Security Council (though by the usurping of the functions of the Security Council by the General Assembly, this special responsibility of the permanent members of the Security Council had been put aside together with the Security Council itself), (2) the substantial public and private investments of certain States in the area;
- (c) the expenses should be borne by those States whose action had necessitated the creation of the Force.

At that time a great deal was said at the meetings of the Fifth Committee (697th and 698th meetings) about the fact that the costs of the Force related rather to Chapters VI and VII of the Charter, that it was impossible to apply to those costs Article 17 which related to expenditures under the regular United Nations budget, that UNEF had not to be financed in the same way as the regular United Nations budget ("had that not been true, expenditure on UNEF could have been included under Section 4 of the regular budget estimates, relating to special missions and related activities"), and that "financial commitments arising out of emergency action under the Charter should be allocated by an entirely different system from that provided for the Organization's regular expenses".

Thus were expressed the views of Member States on the question of meeting the expenses for the Force in some way other than as budgetary expenses.

At the same time voices were raised against the conversion of the UNEF, as an Emergency Force set up (though not by the appro-

priate organs) for stopping the aggression against Egypt, into a permanent international police force, "which had nothing in common with the principles of the Charter".

22. In order somewhat to weaken the resistance of a number of delegations, some Member States promised to make voluntary contributions "as special assistance towards the 1959 UNEF expenses".

The General Assembly, in resolution 1337 (XIII) of 13 December 1958 (being obviously under the influence of those promises) stated that the expenses for the Force "shall be borne by the Members of the United Nations *in accordance with* the scale of assessments adopted by the General Assembly for the financial year 1959".

As can be seen, the General Assembly still did not consider it possible to relate the allocated sum directly to the budget for the year 1959, and suggested that this sum should be apportioned in accordance with the regular scale.

Explaining why the allocated sum was not included in the budget, it seemed appropriate to some to refer to the fact that "cost estimates could not ... be developed with any precision"; but the sum of \$19 million had been determined. Attention is drawn to the increased number of countries which abstained while voting this part of the resolution: out of 67 votes, 28 abstained. And even this procedure of financing was approved only for the year 1959.

The General Assembly was compelled to look once again for new means of solving the problem of financing the Force. At the suggestion of one of the delegations, it decided to request the Secretary-General "to consult with the Governments concerning the manner of financing UNEF in the future...".

23. The required consultation was carried out (see Doc. A/4176 and Add. 1 and 2). Out of 50 States who sent an answer, 23 States expressed the opinion that the implementation of the regular scale of assessments should be used. Some of them considered that the expenses of UNEF "should be borne by the regular budget of the United Nations itself", that the Force should be financed "under the regular budget of the United Nations", being against an independent account. Six of the States supported the implementation of the regular scale.

The General Assembly by its resolution 1441 (XIV) of 5 December 1959 did not adopt the course of including the expenses for UNEF in the budget of the Organization, and therefore it did not mention Article 17 of the Charter. Having allocated some further \$20 million it (a) decided to assess the amount "against all Members of the United Nations on the basis of the regular scale of assessments", and (b) striving to overcome the resistance of a number of delegations, it resolved that voluntary contributions "shall be applied as a credit to reduce by 50 per cent. the contributions of as many

Governments of Member States as possible, commencing with Governments assessed at the minimum percentage of 0.04 per cent....". This peculiar form of influencing the vote produced its results, though they were modest. As a result of this measure the number of those voting for this resolution somewhat increased and the number of those abstaining slightly decreased (this number, in comparison with the results of the voting on resolution 1337 (XIII), was still rather substantial), though it did not exert much influence on the actual contributions for the UNEF.

24. In December 1960 the General Assembly reconsidered the question of financing UNEF. The problem of UNEF was, at that time, somewhat overshadowed by the events in the Congo. At the sessions of the Fifth Committee it was already stated that UNEF had lost its emergency character. The complaint was made that there had not yet been any final decision with regard to the methods of financing the Force.

There continued to be contradictory views as to who should bear the financial burden of maintaining the Force and who should be released from it. Each year considerable amounts were allocated, and with each year that passed the arrears were increasing. Some of the States, protesting against the anti-Charter creation of the UNEF, stated more than once that they would not participate in its financing.

But not only those who abstained from the voting, but even some of those who voted, have not paid. According to the data issued by the Secretariat (Doc. Dossier 217) up to 31 December 1961, more than 30 States have not made their payments to the UNEF special account for 1957, 1958 and 1959, and more than 40 States for the year 1960. The Advisory Committee on Administrative and Budgetary Questions proposed a number of "possible alternatives" in order to find a way out of the critical financial position of the United Nations; in particular (a) to increase the Working Capital Fund; (b) to finance UNEF from a section of the regular budget; (c) to establish a Peace and Security Fund; etc.

But the General Assembly in its resolution 1575 (XV) of 20 December 1960 disregarded these suggestions, limiting itself to a repetition of the former formula about the assessment of the allocated sum (\$19 million) "against all States Members of the United Nations on the basis of the regular scale of assessments", indicating only one thing, i.e. for which States a reduction of 50 per cent. should be provided at the expense of the voluntary contributions.

25. A year passed. The General Assembly has been plunged in the operations in the Congo, which it undertook itself despite the provisions of the Charter, by-passing the Security Council. The

operation in the Middle East seemed to be unnecessary. Attention was paid to the fact that "there were fewer incidents in the area, and the threat of a renewed conflict has been diminished". It was hoped that the Force might shortly cease to function.

The General Assembly in resolution 1733 (XVI) of 20 December 1961 did not give a radically new solution to the question of financing the UNEF. The General Assembly partly used the formulae of resolution 1732 (XVI) approved by it on the very day of the financing of the operations in the Congo. It assigned funds for the operations in the Middle East for half a year only, decided to continue the special account for the expenses of UNEF (and not to include the expenses in the regular budget), apportioning the appropriated sum among all States Members of the United Nations in accordance with the regular scale of assessments for 1962, appealed to Member States to make voluntary contributions, and went forward along the road of reducing the assessment of a number of Member States (not only by 50 per cent., but even by 80 per cent.).

26. The whole history of financing the United Nations operations in the Middle East, mentioned above, shows that in no case could it have been carried out according to the regular scale of assessments, as those operations had an anti-Charter but at the same time a peace-keeping character. It is known that the financing of peace-keeping operations is not made within the regular budget. One should apply to Article 43 and not to Article 17. And though the Secretary-General and some of the delegations were forcing the General Assembly to refer to Article 17, the General Assembly makes no direct reference in its resolutions to Article 17 (2) of the Charter.

27. Coming to the operations in the Congo, the Opinion of the Court gives no detailed analysis: neither of the Security Council's resolutions nor those of the General Assembly. In its Opinion the Court limited itself to objecting to the statements that the resolutions were implemented in violation of the Charter, stressing that the actions of the Secretary-General in implementing the resolution of 14 July 1960, and consequently other resolutions of the Security Council, were confirmed, approved and ratified by the Security Council and the General Assembly.

If one sought to find one's way through the paper jungle (according to the expression used by Mr. Lowton, the British Judge), through the voluminous documentation submitted (though it is not complete) to the Court by the Secretariat on the instructions of the General Assembly as "likely to throw light upon the question", then it would be possible to find quite a lot of complaints that there

was a great divergence between what was written down in the resolutions and their implementation.

And if, in regard to the operations in the Middle East, one could state that they were implemented *ultra vires*, beyond the powers permitted to the General Assembly by the Charter, then, regarding the operations in the Congo, we may say that they were carried out *ultra vires* as well as *ultra terms* of the mandates given to the Secretary-General.

It seems appropriate, though this has not been done in the Opinion of the Court, to give a short account of the resolutions of the Security Council and the General Assembly which were approved in regard to the Congo. Otherwise it would be impossible to evaluate the degree to which these resolutions (including matters concerning financing) and their implementation correspond to the provisions of the Charter.

The Court must not shut its eyes to reality. The image of Themis with her eyes blindfolded is only an image from a fairy-tale and from mythology. The Court, taking reality into consideration, should at the same time have in mind the strict observation of the Charter.

I am prepared to stress the necessity of the strict observation and proper interpretation of the provisions of the Charter, its rules, without limiting itself by reference to the purposes of the Organization; otherwise one would have to come to the long ago condemned formula: "The ends justify the means".

28. Reports about the beginning of the tragic events in the Congo reached the United Nations on 13 July 1960, when the Government of the newly-organized State sent telegrams. The Congo Government asked the Organization to provide military aid in order "to protect national territory against acts of aggression committed by Belgian metropolitan troops". Chapter VII of the Charter ought to have been brought into action here. It had to be determinative in choosing the methods for dealing with a threat to the peace and the means for their implementation.

In the Security Council, during the discussion of the Congo Government's request, reference was made to the necessity of halting the aggression against the Congo, and the aggression to be condemned. But the Security Council, in resolution S/4387 of 14 July 1960, called upon "the Government of Belgium to withdraw its troops from the territory of the Republic of the Congo" (this was the main point in the resolution) and decides "to authorize the Secretary-General ... to provide the Government [of the Republic of the Congo] with such military assistance as may be necessary until, through the efforts of the Congolese Government with the technical assistance of the United Nations, the national security

forces may be able, in the opinion of the Government, to meet fully their tasks”.

It was apparently supposed that the Belgian Government would answer the appeal of the Security Council and would withdraw its troops from the Congo, that some of the African States, who agreed to render military assistance, would really lend it, that “the technical assistance in developing the security administration” of the Congo, to which the Secretary-General referred, would be carried out by the Secretariat. All this would hardly have required any considerable funds. Therefore, the question of financing had not yet been put forward at that period.

29. The situation in the Congo became more complicated with each day that passed. The Belgian troops had not been withdrawn. The Secretary-General brought there the armed forces, which he regarded as being “necessarily under the exclusive command of the United Nations, vested in the Secretary-General under the control of the Security Council”. This whole formula contradicts what is said in Article 43 (that the armed forces should be made available to the Security Council on its call), in Articles 45 and 46 (which stipulate that the strength of national contingents and plans for their combined action shall be determined by the Security Council). The Military Staff Committee has been forgotten.

Attention is involuntarily drawn to the Secretary-General’s report (Doc. S/4389) in which it was said that “it is for the *United Nations* alone to decide on the composition of military elements”, instead of the clear references made in the Charter to the effect that this right belongs to the Security Council.

30. In its resolution (S/4405) of 22 July 1960, the Security Council once more called upon “the Government of Belgium to withdraw its troops”, authorized “the Secretary-General to take all necessary action to this effect”, and requested “all States to refrain from any action which might tend to impede the restoration of law and order and the exercise by the Government of the Congo of its authority and also to refrain from any action which might undermine the territorial integrity and the political independence of the Republic of the Congo”.

This corresponds to Article 39 of the Charter according to which the Security Council, while determining “the existence of any threat to the peace ... or act of aggression ... shall make recommendations, or decide what measures should be taken...”.

At that time in the Security Council it was pointed out that it was necessary to ensure the withdrawal of Belgian troops without delay in order to safeguard the territorial integrity of the Republic of the Congo, that the restoration of law and order in the Congo should be effected by the Central Government of the Republic of the Congo, and by no-one else, that, thus, this resolution cannot be regarded

“as endowing the United Nations with the right to interfere in the domestic affairs of a State and to assume responsibility for a country’s domestic laws and regulations” (S/P.V./879, paras. 116, 120, 121).

31. Before long (8-9 August 1960) the Security Council had to turn back to the Congo, where the situation became more and more complicated. The Belgian troops had not been withdrawn, especially from the province of Katanga. Some of the delegations had reason to suppose that there existed some forces who were striving to dismember the Congo. Another tendency—to prevent the resolutions of the Security Council from their proper realization—was marked as well. The question, put by a delegate of one of the African States: How the position taken by the Security Council was carried out—has become the main question in evaluating the Security Council’s resolutions.

It was said that the United Nations armed forces were slow in entering Katanga despite the request of the Central Government of the Congo. Moreover, instead of ensuring the withdrawal of Belgian troops from the Congo, as stated in the telegram of the Government of the Congo, “the United Nations troops are disarming our (Congoese) soldiers and allowing Belgian forces to keep their arms which is incomprehensible”. Some of the African States raised protests. In the Security Council statements were made demanding that an end be put to Belgian intervention in the domestic affairs of the Congo (disintegration of Katanga from the Congo), and that the legitimate rights of the Government of the Congo be restored.

And for the third time the Security Council, in its resolution of 9 August 1960 (Doc. S/4426), called upon the Government of Belgium to withdraw immediately its troops from the province of Katanga, reaffirmed “that the United Nations force in the Congo will not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise” and called upon “all Member States, in accordance with Articles 25 and 49 of the Charter of the United Nations, to accept and carry out the decisions of the Security Council and to afford mutual assistance in carrying out measures decided upon by the Council”. The last call directed to Member States was apparently caused by the obstacles put in the way of implementing the Security Council’s resolutions.

The references made to Articles 25 and 49 of the Charter reaffirmed that the Council’s appeals were nothing else but decisions binding on all Members of the United Nations. Besides, these references refute any suggestion that Chapter VII of the Charter has nothing to do with the operations of the United Nations Force in the Congo. But I have to discuss this matter a little later.

The resolution of 9 August requested the Secretary-General to implement it, but it did not give him a blanket mandate; it dealt

with a relatively small area of action which he had to organize naturally according to the procedure provided by the Charter. This was stressed in the explanations of votes and in the statements made at the following sessions of the Security Council. In this respect it should be noted that the estimates of the results of the voting on the basis of purely arithmetical counting without taking into consideration the real position of Member States, can hardly be regarded as right.

Thus the USSR delegation explained that, despite some shortcomings of the resolution, it voted in favour of the text because it enabled the Security Council to carry out its most important task, namely to ensure that Belgium would immediately and unconditionally withdraw all its troops from the entire territory of the Republic of the Congo, including the province of Katanga (S/P.V. 886, para. 283).

32. In September 1960 the Security Council had to concern itself with a more detailed consideration of the methods of implementation of its preceding resolutions. The Belgian troops were still stationed on the Congolese territory. The separatist elements with the support from outside had in fact separated Katanga from the Congo. Some of the African States paid attention to the serious errors in the implementation of the Security Council's resolutions, to the erroneous orders issued by the Command. The Prime Minister of the Republic of the Congo protested against the interference of the Secretariat in the internal affairs of the Congolese nation. There were even some statements about the attempts to overthrow the existing Government. It was clear that some of the States tried to rectify the errors. But the draft resolution which was introduced to the Security Council did not satisfy some Members of the Council, and therefore it was not approved.

33. The Court may not go into the dramatic troubles into which the Republic of the Congo was plunged. But it cannot avoid the fact that immediately after this draft resolution had been voted down by the Security Council there was called an emergency Special Session of the General Assembly (on the date of the opening of its regular session) at which the above-mentioned draft of the resolution was approved, with some amendments.

We shall not dwell at present on the concrete content of this resolution. Though it did not suggest any measures for eliminating the errors to which the delegations paid their attention in the Security Council, and at the Extraordinary Session as well, it repeated the formulae discussed in the Security Council, the style of its resolutions, preserving even the references to Articles 25 and 49 of the Charter concerning the Security Council, and thus led itself to the denial of its powers to consider this question. Its statement that it "fully supports the resolutions of 14 and 22 July and

of 9 August 1960" may be considered as nothing else but a moral support of the Security Council's resolutions. It would hardly be possible to reach a conclusion that we have here an example of some kind of collaboration between the two main bodies of the United Nations Organization in maintaining and restoring international peace and security.

People say that you cannot have two coachmen in the driver's seat. In the cause of the struggle for international peace and security, in the question of their maintenance or restoration, in questions of "action with respect to threats to the peace, breaches of the peace, and acts of aggression", the organizational confusion would only have been harmful. Therefore the Charter clearly enough delimits the functions of the Security Council and those of the General Assembly.

To place the Security Council, as the Opinion does, beside the General Assembly, considering them as interchangeable in solving and implementing the tasks of maintaining international peace and security, would be objectively to replace the Security Council by the General Assembly, to put the Council aside and thereby undermine the very foundations of the Organization. It does not befit the Court to follow this line. It has been said that you cannot leave one word out of a song. The Charter represents one of the most important international multilateral treaties, from which it is impossible to leave out any of its provisions either directly or through an interpretation that is more artificial than skillful.

The Court's Opinion thus limits the powers of the Security Council and enlarges the sphere of the General Assembly. The Opinion achieves this by (a) converting the recommendations that the General Assembly may make into some kind of "action", and (b) reducing this action, for which the Security Council has the authority, to "enforcement or coercive action", particularly against aggression.

34. In order to prove that the General Assembly, in the matter of maintaining international peace and security, may not only discuss and make recommendations but take measures and carry out "actions" as well, the Opinion examines Articles 10, 11, 12, 14, 18 and 35 of the Charter.

The Opinion quotes Article 18 in order to show that the Assembly may take decisions. This has never been denied by anyone. But the questions mentioned in Article 18 have nothing in common with the question of maintaining international peace and security. The General Assembly may only discuss the latter and make recommendations.

Article 14 of the Charter, which the Opinion apparently considers to be specially important for purposes of transforming a "recom-

'mendment" into an "action" provides that "the General Assembly may recommend measures for the peaceful adjustment of any situation...". "To recommend measures" does not mean "to take measures". The General Assembly in fact may recommend *measures* but, as has already been pointed out, it is not the General Assembly that takes these measures but those to whom the recommendations are addressed. Article 11 of the Charter makes it clear to whom the recommendations relating to the maintenance of international peace and security may be addressed. That Article provides that the General Assembly "may make recommendations with regard to such principles to the Members or to the Security Council or to both". Article 10 also provides (apart from the reference to the natural powers of the Assembly to discuss any question of any matters within the scope of the Charter) that "The General Assembly ... except as provided in Article 12, may *make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters".

The Opinion of the Court supposes that Article 11 (2) may be interpreted in such a way that it appears that the General Assembly "could make recommendations only of a *general character* affecting peace and security *in the abstract*, and not in relation to specific cases".

I do not consider it proper to make such an interpretation. Article 35, for example, has in view a "special case"; Article 11 refers to "recommendations with regard to any ... 'questions'". The recommendations may be, and it is even desirable that they should be, concrete. But the point is that the General Assembly may make *only* recommendations in regard to any questions relating to the maintenance of international peace and security except as provided in Article 12. It may, for example, recommend a cease-fire; but it cannot set up the United Nations Force and decide to bring it into an area of military conflicts in order to provide the implementation of the cease-fire. Article 35 of the Charter deals with the proceedings of the General Assembly in respect of matters brought to its attention concerning any dispute, or any situation which might lead to international friction. But this Article makes a direct reference to Articles 11 and 12, and adds nothing new to our question.

To reach the conclusion, on the basis of the aforementioned Articles, that the Assembly may "organize peace-keeping operations" would, from a logical point of view, mean, to say the least, an anti-Charter encroachment upon the sphere of powers of another organ; while "to organize peace-keeping operations" means no more than "to perform peace-keeping actions".

35. The Opinion curtails the functions of the Security Council, reducing them, in the question of maintaining international peace and security, to the implementation of enforcement or coercive action. In this connection, the Opinion indicates that the Security Council, as provided in Article 24, has merely the primary but not the exclusive responsibility.

The word "primary" is not used in Article 24 in the sense of an ordinal number (i.e. first, second, etc.), but, one may say, in the hierarchical sense. The French text reads: "la responsabilité *principale*", the Spanish text: "la responsabilidad primordial", and the Russian text: "glavnuju otvjetstvjennostj" (which literally translated means "chief", "main" responsibility).

Of course no single organ of the United Nations has the monopoly in the matter of the maintenance of international peace and security, which is one of the main purposes of the United Nations. But the Organization is a complicated and intricate piece of "international machinery" in which each of the organs, as separate parts, has a specific sphere of operation as provided in the plan, and with regard to the Organization, as provided in its Charter.

Despite all efforts to the contrary, under the Charter only the Security Council may take an action with regard to a question relating to the maintenance of international peace and security. Such is the meaning of Article 11 (2). It reads: "Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

36. According to the Opinion the action which the Security Council should take is enforcement or coercive action. It is worth mentioning incidentally that the Security Council may not only take "action" but also make recommendations although they are not "action" as that word is used in the Charter.

But it may be agreed that the Security Council's decisions have a coercitive or (that is almost the same) enforcement character. (This is borne out by Article 25 and by the whole of Chapter VII itself; mention may also be made of Article 94 (2) of the Charter.) But the main point in the arguments apparently lies not in this, but in the statement that the Security Council is competent to implement enforcement action directed *against* any of the States "if for example [to use the words of the Opinion] it [the Security Council] issues an order or command to an aggressor under Chapter VII". What is the basis for such an interpretation? If we turn to the first Article of Chapter VII, i.e. to Article 39, we are unable to find there any direct reference to the fact that the measures which, as decided by the Security Council, "shall be taken ... to maintain or restore international peace and security" should be directed against any of the States. But then the question arises: What prompted the above-mentioned interpretation? It is hardly worth reasoning in

the abstract, and losing contact with the real situation that gave rise to the request for an Advisory Opinion and to the above-mentioned interpretation. The matter concerned the procedure for financing operations in the Congo. A number of Member States insisted that the question concerning the financing of these operations should be decided by the Security Council in accordance with Article 43 of the Charter.

The course of reasoning followed by the opponents of such a position may be outlined as follows: the implementation of Article 43 of the Charter might have been necessary, had the aforementioned operations been carried out in compliance with the procedure provided by Chapter VII of the Charter; Chapter VII allegedly provides for enforcement action against any of the States. The operations in the Middle East and in the Congo are allegedly not directed against any of the States. Ergo, the provisions of Article 43 of the Charter cannot be applied to them.

This is motivated in the statements of some delegations and in the Secretary-General's reports. In one of his latest statements (A/C.5/864), the Secretary-General, summarizing the statements of some delegations, spoke of the inapplicability of Article 43 of the Charter inasmuch as the Security Council's resolutions regarding the Congo could be considered as implicitly taken under Article 40, but certainly did not involve the type of coercitive action directed against Governments envisaged by the enforcement measures of Articles 41 and 42.

This provision has apparently been suggested to their chief by his legal advisers, who had in mind what had been said in literature or what they themselves had published; they did not, however, take into consideration the fact that Article 40 is closely connected with Articles 41 and 42 of the Charter through Article 39. The situation in the Congo was by no means a simple one and all efforts were devoted to preventing an aggravation of the situation. It was not simply a question of "call[ing] upon the parties concerned to comply with such provisional measures as it deems necessary or desirable".

37. Long before that date, the Security Council had had to take "account of failure to comply with such provisional measures" as provided in its resolutions from July 1960 onwards. And it inevitably had to turn its attention to the other Articles of Chapter VII.

Moreover, the Security Council should, from the very beginning, have acted in compliance with Article 39 of the Charter.

As already noted, the Government of the Republic of the Congo, applying for assistance on 13 July 1960, pointed out that "the purpose of the aid requested is not to restore the international situation in the Congo but rather to protect the national territory against acts of aggression".

If the Security Council in its resolutions did not call the activity of the Belgian troops an aggression, then this was only for tactical reasons. "We have refrained", said the representative of Tunis (speaking in support of the draft resolution submitted by Ceylon and Tunis) "... from using the word 'aggression' or even the term 'aggressive acts' in resolutions, since we are most anxious not to exacerbate the feelings of the Belgian people..." But this cannot change the essence of the matter.

The Secretary-General was authorized to take all necessary action and to use force, if necessary, in the last resort. Military contingents were sent. The so-called United Nations Force in the Congo had grown up into an army numbering many thousands. To maintain this army and its operations, millions of dollars have been spent.

The United Nations Force was sent there, not to persuade or to parade, but to carry out military operations. And they did so. If we direct our attention to the last events connected with the blockading of the roads leading to Elizabethville, then we may say that such a blockade can be easily related to the measures provided by Article 41 of the Charter. Thus the whole chain of logical considerations, designed to justify the deviation from Article 43, may be easily torn to pieces on contact with reality.

For less than half a year more than \$60 million were spent for the operations in the Congo. This greatly exceeded the expenses for UNEF and even the regular expenses for the United Nations itself.

The amount of the expenses, the character of the operations, the contradictions in the evaluation of the character of the United Nations Organization's activity in the Congo, the methods of implementing the approved resolutions have influenced the contradictory views put forward during the debates on the methods of financing the above-mentioned operations.

There could not have been the same common approach to the methods of financing which characterized budget appropriations.

The report of the Fifth Committee of 19 December 1960 (A/4676), which summed up the methods of financing the operations in the Congo, as proposed by the delegations, has indicated six different methods:

"(a) The expenses should be included in the regular budget and apportioned among the Member States in accordance with the 1960 scale of assessments for Members' contributions;

(b) The expenses should be entered in a special account and apportioned among the Member States in accordance with the 1960 scale of assessments for Members' contributions to the regular budget; voluntary contributions should be applied, at the request of the Member State concerned, to reduce the assessments of Members with the least capacity to pay;

- (c) The expenses should be met under special agreements concluded in accordance with Article 43 of the Charter; between the Security Council and the countries providing troops;
- (d) The expenses should be borne in larger part by the permanent members of the Security Council, as having a major responsibility for the maintenance of peace and security;
- (e) The expenses should be borne in larger part by the former administering Power;
- (f) The expenses should be financed entirely out of voluntary contributions."

Having regard to the approach of different groups of States to the methods of financing the operations in the Congo, the only way to reach a proper decision should be strict compliance with the Charter, of which Article 43 was to be regarded as decisive.

38. But the General Assembly in resolution 1583 (XV) of 20 December 1960 has followed another course. It accepted that "the expenses involved in the United Nations operations in the Congo for 1960 constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations and that assessment thereof against Member States creates binding legal obligations on such States to pay their assessed shares".

One need not for the present embark upon a critical analysis of these "preambular recitals" inasmuch as this whole resolution soon ceased to be mentioned (and this was not by chance) in the list of those resolutions which were recalled in subsequent resolutions (as is the tradition of the Organization).

It is however important to note that the Assembly did not dare to include in the regular budget the expenses of the Congo operations as advocated by some of the delegations. The delegate of the USA, whose Government had made a voluntary contribution, stated:

"The voluntary contribution was offered on the assumption that the costs for 1960 would be incorporated in the regular budget of the United Nations for that year. The United States wished to ensure that no-one would be tempted to argue in the future as some had argued without foundation in the past, that there was no legal obligation to pay assessments for expenditure which was not incorporated in a section of the regular budget." (A/C.5/SR.803, para. 36.)

But the Assembly decided to establish only an *ad hoc* account (not even a special account) for the expenses of the United Nations in the Congo. And the voluntary contribution, which was made with a purpose in view was used, as in the case of resolution 1575 (XV) for UNEF, to provide a reduction of up to 50 per cent. in the

contributions of those Governments with a limited capacity to pay. But some reference has already been made to the true meaning of such a reduction and I must revert to this point. It is impossible not to mention the fact that slightly more than a half, i.e. 46 out of 87, voted in favour of this resolution.

But when on the same day resolution 1590 (XV) appropriating \$24 million for the operations in the Congo for the period from 1 January to 31 March 1961 was put to the vote, less than half of the delegations, i.e. 39 out of 97 (44 delegations abstained) voted for it. This sounds stronger than adoption without a dissenting vote.

39. In February 1961 tragic events occurred. The Congolese national leaders, M. Lumumba and others, were killed. The Belgian troops were still not called back. The Security Council, having come to the conclusion that an immediate and impartial investigation should be carried out in order to ascertain the circumstances of the death of M. Lumumba and his colleagues and that the perpetrators of these crimes should be punished, approved a resolution on 21 February 1961 in which it urged "that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort"; and "that measures be taken for the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and para-military personnel and political advisers not under the United Nations Command, and mercenaries".

Inasmuch as the Opinion of the Court states that this resolution was also approved without a dissenting vote, a fact which is regarded as constituting approval of the Secretary-General's actions, I am obliged to quote the statement made by the representative of the USSR in the Security Council while this resolution was being voted on. He said that the delegation of the Soviet Union decided not to prevent the adoption of this resolution despite its weakness and shortcomings, as it still contained an objective condemnation of the national leaders' murderers and a demand to take measures for the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and para-military personnel and, also, because the delegation was taking into consideration the wish of the African and Asian countries.

But at the same time the representative of the USSR made an objection against entrusting the Secretary-General with the implementation of the suggested measures.

Therefore, any kind of vote on the resolution (and especially abstention from voting) does not mean that *all* the paragraphs of the resolution were approved by all those who did not cast a dissenting vote. Such reservations are often made, even while voting "for" a resolution.

40. Attention should be drawn to the increasing number of those who abstained from voting on the resolutions on financing the operations in the Congo. It sometimes happened that the number of those abstaining exceeded the number of those voting "in favour". An evaluation from the political point of view must be made but this also requires a reconsideration of the importance of abstention from the procedural and juridical point of view.

Abstention from the vote on the resolutions cannot be made equal to the Old Roman "*non liquet*". Another Old Roman rule could be recalled, i.e. if one ought to say "yes", but keeps silent, then that means "no". But that would be excessively logical. Abstention from the vote on the resolutions on these or those measures proposed by the Organization should rather be considered as an expression of unwillingness to participate in these measures (and eventually in their financing as well) and as unwillingness to hamper the implementation of these measures by those who voted "in favour" of them.

Such an interpretation is proved by the way in which payments for UNEF operations, and especially for ONUC, are made by States whose delegations abstained from voting.

According to the data available on 1 June 1962, more than 30 States, whose delegations abstained from the vote on financial resolutions for the Congo operations, did not make their payments to meet the expenses of those operations, though most of them had made such payments for the regular budget. This was a peculiar voting by non-payment.

41. The operations in the Congo became more complicated and expensive although the main tasks, which were set out in the resolutions of the Security Council, had not been implemented.

Though the General Assembly deplored that "the Government of Belgium has not yet complied with the resolutions and that such non-compliance has mainly contributed to the further deterioration of the situation in the Congo" and expressed once more the conviction "that the central factor in the present grave situation in the Congo is the continued presence of Belgian and other foreign military and para-military personnel and political advisers, and mercenaries, in total disregard of repeated resolutions of the United Nations", it decided that the above-mentioned contingents and personnel "shall be completely withdrawn and evacuated" (reso-

lution 1599 (XV) on 15 April 1961). At the same time, it complained of "the many difficulties that have arisen in the way of effective functioning of the United Nations operation in the Congo", considered "it essential that necessary and effective measures be taken by the Secretary-General immediately to prevent the introduction of arms, military equipment and supplies into the Congo, except in conformity with the resolutions of the United Nations" and urged the release of all members of Parliament, all political leaders under detention, and the convening of Parliament without delay. It called upon the Congolese authorities to co-operate fully in the implementation of the resolutions of the General Assembly, and although it decided to appoint a Commission of Conciliation (resolution 1600 (XV) of the same date), it nevertheless continued to appropriate millions of dollars "pending action" by the General Assembly (resolution 1595 (XV) of 3 April 1961).

When the enormous sum of \$100 million had to be appropriated for nine months, the General Assembly was confronted with an acute problem of the methods of apportionment of these expenses. The amount of the appropriations itself (which was twice as large as the corresponding appropriations in the regular budget) stressed the qualitative differences between the expenses of the Congo operations and those for the normal (regular) budget. The General Assembly's resolutions 1619 (XV) and 1620 (XV) of 21 February 1961 have revealed it. I propose to return to this matter a little later.

It is important at this stage to state that resolution 1619 (XV) fixed the results of the continuous struggle that has been going on in the Fifth Committee and at the plenary meetings of the Assembly on the question of the procedure and resources for financing peace-keeping operations.

The Assembly clearly acknowledged that "the extraordinary expenses for the United Nations operations in the Congo are essentially *different in nature* from the expenses of the Organization under the regular budget and that, therefore, a procedure different from that applied in the case of the regular budget is required for meeting these extraordinary expenses"; and decided "to open an *ad hoc* account for the expenses of the United Nations operations in the Congo for 1961" and to apportion as expenses of the Organization the amount of \$100 million among the Member States in accordance with the scale of assessment for the regular budget. At the same time, there was fixed for some of the States a reduction up to 80 per cent. of the corresponding assessment. This, however, was considered as a temporary measure. There was mentioned a year (1961) for which this sum was appropriated and the sum itself (\$100 million) that was to be apportioned. Besides, it was stated that the aforementioned apportionment was effected "pending the establishment of a different scale of assessment to defray the

extraordinary expenses of the Organization resulting from these operations”.

In this last part of the phrase the Opinion finds confirmation of the fact that in this case reference is made only to *another scale of assessment* and not to some method other than assessment. But it is important to stress that the resolution states that the expenses for operations in the Congo are essentially *different in nature* from the expenses of the Organization under the regular budget. Expenses of a different nature require different procedures. The General Assembly did not consider this to be the only procedure for defraying the extraordinary expenses of the Organization resulting from these operations. In the same resolution the General Assembly appealed to the permanent members of the Security Council and to the Government of Belgium to make voluntary contributions.

Moreover the General Assembly did not choose any of the “generally recognized procedures”. In resolution 1620 (XV) approved on the same day, the General Assembly decided to provide for the study of the following points:

“(a) Methods for covering the cost of peace-keeping operations;

(b) The relationship between such methods and the existing administrative and budgetary procedures of the Organization.”

42. By the end of 1961 the resolutions of the Security Council on the Congo were not yet implemented. Katanga was practically separated. The General Assembly continued to appropriate ever new amounts for operations in the Congo.

Resolution 1633 (XVI) of 30 October 1961 authorized the Secretariat to incur commitments of \$10 million per month. The divergencies about financing these operations became more acute. I have already cited various, and at times diametrically opposed, methods proposed for financing operations in the Congo. The Working Group of Fifteen which was specially appointed for the examination of the administrative and budgetary procedures of the United Nations stated, on the result of its work, that its report had been unable to indicate, because of the divergence of opinion among its members, any precise principles for finding a solution to the problem of financing peace-keeping operations undertaken by the United Nations (A/4971). The number of votes not cast in support of the resolutions, especially the number of abstentions, increased. The number of Member States which “abstained” from payment for operations in the Congo, even from among those who voted for the resolutions, also increased (though these Members, as a rule, are not in arrears in their contributions under the regular budget). According to the data on 1 June 1962, 49 Member States did not pay for the operations of the Congo in 1960; still more for the operations in 1961.

It was further stressed and became more evident that operations in the Congo should be exclusively within the competence of the Security Council, as they included such questions as the scope of the operations, the size and disposition of the Force, its armament and equipment. The Security Council, discussing the problems of the operations, had to determine in what way the questions relating to the financial implications of the operation were to be solved. Therefore, when the General Assembly at its session on 21 April 1961 failed (in one of the phases of the discussion) to come to a solution of the question of financing the operations in the Congo, the delegation of Ghana submitted a draft resolution in which it suggested that the question of "cost estimates and financing of the United Nations operations in the Congo be referred immediately to the Security Council for consideration".

The question, as we have seen, was solved without appealing to the Security Council, but the suggestion made by the delegation of Ghana is very significant. It had chosen the proper way of solving this problem.

Once more the Security Council had to deal with the question of the operations in the Congo. Its resolution (S/5002) of November 1961 may be said to sum up the provisions of all its previous resolutions.

Being a judge, I am not able to make an evaluation of this resolution. It is essentially a political document.

I deem it necessary to direct my attention only to what is related to the voting of this resolution, inasmuch as the Opinion attaches importance to the absence of a dissenting vote.

The representative of the Soviet Union voted for the above-mentioned resolution, but in his statement on the reasons for his vote he said that he considered it possible to support the draft because it satisfied the main task, i.e. it drew the attention of all the staff of the United Nations Organization and the United Nations Force to the solving of the problem of eliminating the source of foreign intervention in Katanga.

43. Generally speaking, after a study of all the Security Council's resolutions with regard to the Congo (and this had to be done because it was sometimes stated that the expenses of the operations in the Congo were those of the Organization, inasmuch as these operations were carried out in compliance with the Security Council's resolutions), it should be stated that there was no necessary conformity between the concrete, narrowly-specific resolutions of the Security Council and the arbitrary carrying out of the operations (which in the main hardly corresponded to the resolutions of the Council).

What is involved even more is the procedure of implementation of such operations, which is completely at variance with the provisions of the Charter.

44. The General Assembly, by its resolution 1732 (XVI) of 21 December 1961 providing for the appropriation of some further \$80 million for operations in the Congo up to 1 July 1962, almost completely repeated its resolution 1619 (XV).

We can find there an acknowledgment of the fact that the expenses for operations in the Congo are essentially different in nature from the expenses of the Organization under the regular budget.

The Assembly preserved the *ad hoc* account for the expenses of the United Nations operations in the Congo, and appealed for voluntary contributions and reductions for a number of countries.

The studies of the "methods for covering the cost of peace-keeping operations" initiated by the General Assembly did not lead to the finding of any "generally recognized procedures". This was hindered, not by the Charter and its provisions, but by the heterogeneous political considerations in the aggravated political situation outside and within the United Nations Organization.

45. The General Assembly, in its resolution 1731 (XVI), adopted on the same day, decided to submit to the International Court of Justice for an advisory opinion the question that has become the subject of the Opinion of the Court.

The General Assembly declared that it considered it necessary to have legal guidance as to obligations of Member States under the Charter in the matter of financing the United Nations operations in the Congo and in the Middle East, and, requiring from the Court such a legal guidance, it drew the attention of the Court to the interpretation of Article 17, paragraph 2, of the Charter.

I am not of the opinion that by interpreting this paragraph one would resolve the political divergences that have arisen in the United Nations Organization with regard to the operations in the Congo. The problem submitted to the Court originated in, and is saturated with, political considerations. It seems to me that the background of the resolutions which, in the General Assembly's opinion, called for an advisory opinion, reveals the merely political essence of the question submitted to the Court.

I have already said, and am ready to repeat, that the Court should have "declined to answer the request". But the Court did not agree with this. It pays much attention to the analysis of Article 17, paragraph 2.

46. I have to direct my attention to this analysis too, inasmuch as I cannot agree with the statement of the Court that the expenditures in question (which in their essence are nothing else but expenditures for peace-keeping operations in the Middle East and the Congo) should be considered as "expenses of the Organization

within the meaning of Article 17, paragraph 2, of the Charter of the United Nations”.

The General Assembly's request is to define “expenses of the Organization” *within* the meaning of Article 17, paragraph 2.

It does not ask the Court to define “expenses of the Organization” in general. Indeed this notion may include all expenditures made by the Organization or on its behalf, irrespective of the sources from which it derives them, for example, from different voluntary contributions.

The question submitted to the Court localizes this notion, connecting it with Article 17 of the Charter. But Article 17 deals with the budget. Therefore the question submitted to the Court should be regarded as the question whether it is possible to consider the expenditures made in compliance with the afore-mentioned resolutions as the expenses of the Organization provided by its budget.

47. It is suggested that paragraph 2 is not obligatorily related to paragraph 1 of Article 17, and that paragraph 2 has its own independent meaning, that the apportionment of the expenses which the General Assembly may make is connected with all the expenditures of the Organization, irrespective of whether they were provided in the budget or not.

This however would contradict the position occupied by paragraph 2, and what is sometimes called a “topographical” interpretation of the rules of law. Both paragraphs—the first (on considering and approving the budget) and the second (on the apportionment of the expenses) are not only placed in one Article but the second paragraph follows the first. And such an order is not a coincidence. If we follow the course of discussion at the San Francisco Conference of the Article which later became Article 17, then we may easily see that in the preliminary draft the Article read: “the General Assembly shall apportion the expenses among the Members of the Organization...”, and only then followed the matter of the consideration and approval of the budget.

As a result of the discussion of this Article in the Co-ordination Committee and at the plenary of the Conference, the above-mentioned paragraphs changed places. It was as if the two principal approaches to budgetary policy were placed in juxtaposition.

Here is what is decisive: either the possibility of collecting amounts (by apportionment among the Members) for drawing up the budget or of meeting the amount of expenses necessary for the Organization and then apportioning them among the Members.

The preliminary draft Article appeared to reflect the first approach, and its final form as approved, the second. Thus the question of apportionment is closely connected with the budget and its appropriations.

The budget of the Organization provides for all the expenses necessary for its maintenance (in the narrow sense of this word). These are usually called common expenses, running expenses, and the budget itself is called a regular budget, budget proper, etc. What kind of expenses are these? In each of the annual budgets of the United Nations, the expenses are enumerated. They are expenses for the sessions of the General Assembly, the councils, commissions and committees, for special conferences, investigations and inquiries, for Headquarters, the European Office, Information Centres, hospitality, advisory social welfare functions, etc. These expenses are contrasted with the so-called operational expenses for the various kinds of economic, social and technical assistance programmes. Determined by the various interests of different countries they are usually financed through voluntary contributions, in any case outside the regular budget. In the document submitted by the Secretariat (Dossier No. 195) on the "Budgetary and Financial Practice of the United Nations" there is a division into two parts: (1) *Regular budget* (General Fund and Working Capital Fund), and (2) Trust Funds, Reserve Accounts and Special Accounts *outside the regular budget*. The document enumerates thirteen such Special Accounts among which it names: Special Account for UNEF and *ad hoc* Account for the United Nations operations in the Congo.

Sometimes, in order not to mix the budgetary and non-budgetary appropriations and expenses, a distinction was made with regard to the administrative and operational budgets (if a given programme is so extensive that it necessitates the elaboration of a special budget for it, but this budget does not merge with the regular budget).

The Opinion of the Court, in comparing paragraphs 1 and 3 of Article 17, denies the fact that the notions of "regular budget" and "administrative budget" are identical, since paragraph 1 refers to the "budget" and paragraph 3 to the "administrative budgets" of specialized agencies.

I am not of the opinion that paragraph 3 makes it at all possible to distinguish the "regular" budget from the "administrative" one. Paragraph 3 rather helps, by singling out "financial and budgetary arrangements", to distinguish budgetary from operational expenses, i.e. the expenses provided by the programme outside the regular budget.

The specialized agencies (see Articles 57 and 63) conclude agreements "defining the terms on which the agency concerned shall be brought into relationship with the United Nations"¹.

¹ There is a special United Nations publication entitled: *Agreements between the United Nations and the Specialized Agencies*.

One of the purposes of these agreements is to avoid "the establishment and operation of competitive or overlapping facilities and services", which must inevitably lead to the co-ordination of the budgets.

In the Agreement with the International Refugee Organization of 18 November 1948 it is stated that this Agreement is concluded "with a view to achieving, in so far as practicable, uniformity in presentation of the administrative budgets of the United Nations and of the specialized agencies for the purpose of providing a basis for comparison of the several budgets".

But no other special administrative, separated from the regular budget of the United Nations Organization, is known to the Charter. Apparently the notions "administrative" and "regular" budget coincide.

In so far as I have managed to become acquainted with the budgets of the specialized agencies, I could not find (except in one case) any such notion of administrative budgets.

Thus the Unesco budget is familiar with the notion "regular budget" as opposed to the "financing of activities by funds from sources outside the Organization's budget".

The stressing of this difference in regard to Unesco and other specialized agencies can be explained by the extended development of the programme operations and services. Only in the above-mentioned agreement of the International Refugee organization can one find any such notion of "an administrative budget" (Article XV, 4 (a)).

But this can be explained by the fact that along with the Specialized Agency there also exists "the Office of the United Nations High Commissioner for Refugees", which is being maintained within the budget of the United Nations.

Therefore, the administrative expenditures of the Agency could only have been implemented on a limited scale.

The Statute of the Office of the United Nations High Commissioner for Refugees refers to administrative expenditures and not to the administrative budget:

"The Office of the High Commissioner shall be financed under the budget of the United Nations. Unless the General Assembly subsequently decides otherwise, no expenditure, other than administrative expenditures relating to the functioning of the Office of the High Commissioner, shall be borne on the budget of the United Nations, and all other expenditures relating to the activities of the High Commissioner shall be financed by voluntary contributions."

General Assembly resolution 411 (V) of 7 December 1950 is entitled "Administrative Budgets of the Specialized Agencies". But the text of this resolution refers only to the budgets, stressing the expenditures of technical assistance funds and other extra-budgetary funds.

48. May I now return to the question of the expenses for the operations in the Congo.

Even the fact that those expenses have never been included in the regular budget proves that it is impossible to argue that these expenses might be apportioned under Article 17, paragraph 2, of the Charter. It has been said more than once that peace-keeping operations should be financed in another way.

At the San Francisco Conference the necessity was at any rate realized of establishing a special procedure for assessment of eventual expenditures for operations of this kind. It is the Security Council which has, first of all, to decide about the financial implications of concrete peace-keeping operations. Article 43 gave directives as to how to arrange financial questions which might arise from these operations. Article 17 has nothing to do with these questions unless the Security Council should ask that necessary measures be taken by the General Assembly.

One cannot consider that decisions of the Security Council regarding the participation of any Member State in concrete peace-keeping operations are not obligatory for a given Member. Its obligation to participate in a decided operation was based on Articles 25 and 48 of the Charter. Agreements envisaged in Article 43 proceed from this general obligation. Article 43 says that all Members undertake to make available to the Security Council *on its call* armed forces, etc. Agreements must (not may) specify the terms of participation, the size of armed forces to be made available, the character of assistance, etc., envisaging all the ensuing financial consequences as well. The General Assembly may only *recommend* measures. Expenses which might arise from such recommendations should not lead to an obligatory apportionment of them among all Members of the United Nations. That would mean to convert a non-mandatory recommendation of the General Assembly into a mandatory decision; this would be to proceed against the Charter, against logic and even against common sense.

This applies even more to resolutions adopted not in conformity with the Charter. It is not within the power of the General Assembly "to cure" the invalidity of its resolutions enumerated in the Request by approving the financial provisions of these resolutions.

For the reasons given above I am of the opinion that a negative answer must be given to the question put to the Court by the General Assembly.

(Signed) V. KORETSKY.