DISSENTING OPINION OF JUDGE BUSTAMANTE

[Translation]

1. I am among the Judges who held the view that the question of the *conformity or non-conformity* with the Charter of the United Nations resolutions concerning the Middle East and the Congo should be examined as being a necessary means of appraisement in order to reply to the question put by the General Assembly in its request for an advisory opinion. That is why I consider it necessary to give an account of my line of reasoning in this matter so as to explain my conditional reply to the request and to make the true scope of that reply clear.

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2. First of all, I should explain why I have thought that the Court should give the General Assembly its opinion, in conformity with Article 65 of the Statute.

It is true that a preliminary question was raised in this respect: namely whether it was possible or not to reply to the request for an opinion, since the text of the request relates exclusively to the characterization of certain expenditures as "expenses of the Organization", implicitly excluding any pronouncement on the part of the Court as regards the intrinsic and formal legality of the resolutions by which those expenses were authorized. But I think that the General Assembly's power to determine the limits of the questions upon which it asks an opinion is not incompatible with the power of the Court, as master of its own reasoning, to take into consideration all the elements of appraisement which it thinks useful or necessary in order to arrive at a definition of its standpoint on the question on which an opinion is asked. These elements, having the character of *reasons* for the Court's view, should not be included in the operative part of the Opinion.

This view is in accordance with the rule that the interpretation of one of the clauses of a treaty should be carried out by considering that clause in the light of all the other relevant provisions of the treaty, taken as a whole. Any limitation whatever on this point would run counter to the principle of judicial independence.

Furthermore, the fact that the Court has communicated the request for an advisory opinion to all the Member States in conformity with Article 66 of the Statute implies, in my opinion, an obligation for the Court to consider the points of view of those States which expressed objections to the resolutions referred to in the request. On this point the dossier sent to the Court by the Secretary-General of the United Nations contains abundant documentation. The debates in the Fifth Committee and the General Assembly,

and the report dated 10 November 1961 of the Working Group of Fifteen on the Examination of the Administrative and Budgetary Procedures of the United Nations (Document 57 of the dossier, Part I), reveal the very serious differences of opinion which were expressed regarding various points of interpretation of the Charter bearing on the Middle East and Congo questions and on the expenditures involved. An examination of the problem would be incomplete, and the Court's reply would risk being either fruitless or devoid of any great utility, if these aspects of institutional reality are not taken into account, and if no attempt is made to clear up precisely those doubts and disagreements which led to the request for an advisory opinion.

As I understand it, the case may be put in these terms: since the Charter is the legal standard to which the acts of the United Nations must conform, it follows that a study of the legality (conformity with the Charter) of the resolutions cited in the request constitutes an indispensable factor in the decision whether the expenditures referred to are, or are not, "expenses of the Organization". In the Court's reply an attempt is made to remain strictly within the limited terms in which the request for an opinion has been worded; nevertheless, in the reasoning of the Opinion the question of legality is discussed as an essential premiss. It cannot be supposed that the General Assembly wished to limit the Court's freedom of judgment by excluding absolutely from its own consideration the question of legality. In my opinion, the General Assembly's intention was well stated by the representative of the Government of the United States when, in his oral statement before the Court, he said:

> "... The Assembly ... did not mean to put to the Court a question which it could not answer, or to place conditions upon the Court which would prevent it from answering... From this it follows that, if the Court should differ with the views advanced by the Governments of the United States, the United Kingdom, Australia, Ireland and others, that the issues can properly be limited so as to avoid passing upon the validity of the underlying resolutions, then it is free to inquire into these broader questions." (*Oral Statements*, p. 131, lines 1-4 and 26 ff.)

My conclusion, then, is that the Court can and should reply to the request for an advisory opinion put to it by the General Assembly.

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3. I have said that a prior examination of the legality of the respective resolutions seems to me to be absolutely indispensable for ascertaining whether the expenditures mentioned in the request are, or are not, "expenses of the Organization".

Among the resolutions listed in the request, it should be mentioned that some of them deal exclusively with the political aspects of the two problems of the Middle East and the Congo, describing

events in order to justify the armed action of the United Nations. These are the *basic* resolutions. There are others which, on the strength of the basic resolutions, authorize the commitment of the Organization's resources and prescribe the method of financing the expenditure involved by the action taken. These are the *derived* or *subsidiary resolutions*. The objections raised by certain States relate to a number of resolutions in both groups.

The question of the legality or of the conformity with the Charter of the resolutions examined covers the two aspects of *formal legality* (regularity of form, quorum, votes, etc.) and the *intrinsic* or substantive *legality*. The concurrence of the two factors determines the *validity* of the resolution.

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As to the *formal* legality, the objections raised by certain States relate in particular to the Security Council resolutions concerning the Middle East and the Congo respectively. These two series of resolutions must therefore be examined separately.

In the case of the Middle East, the intervention of the United Nations in Egyptian territory was ordered at the end of October 1956, following an appeal by the Egyptian Government.

During three consecutive meetings (Nos. 748 to 750), the Security Council was not able to secure the unanimity of the permanent Members for adopting a definite position as regards the invasion of Egypt; it therefore decided (resolution of 31 October 1956) to convene the General Assembly in an emergency special session—in conformity with resolution No. 377 A (V) of 1950—"in order to make appropriate recommendations". This was agreed to by 7 votes (including the United States, the Soviet Union and China) to 2 (France and the United Kingdom) with 2 abstentions (Australia and Belgium).

In conformity with Article 27, paragraph 3, of the Charter, a permanent Member which is a party to a dispute which may endanger the peace according to Chapter VI *shall abstain from voting*. *A fortiori*, there must be such abstention from voting if a permanent Member is already a party to an existing conflict involving a breach of the peace (Chapter VII). In this case, France and the United Kingdom were debarred from taking part in the Council's vote, and were under an obligation to abstain. Compulsory abstention is, naturally, the negation of the right to veto. In such a case, the unanimity of the permanent Members refers only to those permanent Members who are duly *entitled* to vote in the matter or *not debarred*; the decisions being valid if taken by the legal majority of the votes, including those of all the permanent Members who are *not debarred*. Hence, the resolution of 31 October was, from a formal point of view, properly adopted.

The General Assembly dealt with the matter on the basis of this Council resolution and, in its turn, passed resolutions Nos. 997 to 1001 and 1121, inspired by the purpose of restoring peace. Since these resolutions were adopted by more than two-thirds of the votes (Art. 18, para. 2), their formal legality is beyond question.

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The operations in the Congo began in July 1960. The Government of the new Republic protested against the entry of Belgian troops on Congo territory, appealing for the military help of the United Nations to obtain their evacuation and also—according to information supplied by the Secretary-General—to obtain assistance so as to restore public order, which was disturbed by mutinies. The Security Council complied with this request and adopted the resolutions of 14 July, 22 July, 9 August and 17 September 1960 and 21 February and 24 November 1961, in which various measures were prescribed, according to the course of events, to deal with the international and internal situation of the country.

As to the *formal* conditions in which the Security Council resolutions were adopted, it should be said that the resolution of 17 September 1960, *against* which one permanent Member (the Soviet Union) voted, concerned the calling of an emergency special session of the General Assembly. Nevertheless, at a later date, namely 21 February 1961, the Security Council reaffirmed resolution No. 1474 (ES-IV) of 19 September 1960, adopted by the General Assembly in the special session called by the Council. The resolution of 17 September was thus indirectly confirmed.

The Security Council's resolution of 22 July 1960 was adopted unanimously. None of the other resolutions involved any votes *against*, but only *abstentions*. It is already well known that an unwritten amendment to the Charter has taken place in the practice of the Security Council, namely, to the effect that the abstention of a permanent Member present at a meeting is not assimilated to the exercise of the right to veto [1]. No doubt this type of amendment may be legally repudiated in a given case by invoking the text of the Charter (Art. 27, para. 3), since no permanent Member has undertaken to apply it without reservations; but in the case of the Congo, of the permanent Members abstaining, none asserted that its abstention was to be regarded as a veto. On the contrary, on two occasions France (17 September 1960) and the Soviet Union (21 February 1961) stated that their attitude did not mean taking up a position contrary to the resolution. Again, China and the United Kingdom on three occasions (resolutions of 22 July and

[1] Georges Day: *Le droit de veto dans l'Organisation des Nations Unies*, Pedone, Paris, 1952; Pierre F. Brugière: *La règle de l'unanimité des Membres permanents au Conseil de Sécurité — Droit de veto*, Pedone, Paris, 1952.

9 August 1960 and 21 February 1961) obliterated, by subsequent favourable votes, any traces of their original abstention of 14 July, although indeed the United Kingdom did renew its abstention on 24 November 1961. The Soviet Union voted for four resolutions and abstained with regard to that of 21 February 1961, considering it not strong enough, although useful up to a certain point. The only country which maintained its abstentionist line was France, except at the meeting of 22 July 1960, when she voted *for*.

The impression in law and conscience given by this vote is that the Security Council's resolutions in the case of the Congo are not devoid of formal legality, and that the resolutions of more recent dates in fact ratify the earlier ones, by continuing the course of armed action.

With respect to the "basic" resolutions of the General Assembly, 1599 (XV), 1600 (XV) and 1601 (XV), all of them dated 15 April 1960, they deal with the carrying out of the Security Council's resolutions within the scope of the objectives laid down by the latter organ. This is also the case with the first resolution 1474 (ES-IV) of the General Assembly, of which I have already spoken and which was ratified by the Security Council. All these Assembly resolutions were approved by two-thirds of the Members present and voting, in conformity with Article 18, paragraph 2, of the Charter. The formal aspect has thus been observed.

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4. The chief objections made by certain States as regards the intrinsic or substantive legality may be summed up as follows:

(a) The Charter—it is said—has been violated because in the case of the Middle East it was not the Security Council but the General Assembly which took the decision to undertake armed action, in contravention of Articles 39 to 43 of the Charter.

I have already explained how the Egyptian question was referred by the Security Council to the General Assembly. Can the Security Council so delegate or transfer its functions? Speaking in general terms, the reply is clearly negative, because that would upset the "spheres of competence" which the Charter has laid down for these two organs. But in this particular case a really exceptional situation, and one not provided for in the Charter, had arisen, by reason of the obvious incapacity of two permanent Members of the Council. The Council evidently thought that it could not take action freely with respect to or against the interested parties without provoking a dangerous breach within the organ, making its intervention ineffective. Faced with this problem, what the Council did, in my opinion, was not to delegate its functions but to return to the Organization the mandate which the latter had conferred upon it under Article 24 of the Charter. The principal reassumes the

exercise of his powers when the agent renounces his mandate or is prevented from exercising it. Thus, as a body representative of all the Member States, the Assembly would be reassuming the exercise of the competence and the responsibility conferred by them on the Security Council under Article 24.

Thus the intervention of the General Assembly may be said to have begun and continued by virtue of a case of *force majeure*, namely the impossibility acknowledged by the Security Council of carrying out its responsibilities in respect of a conflict to which two permanent Members were parties. If account is taken of the fact that the Organization was then faced with this dilemma: either passively to allow the occupation of Egypt to be accomplished, or to adopt urgent measures to preserve peace and put an end to hostilities, it would seem that the Assembly's active intervention may be justified since the Organization was obliged to fulfil the principal purposes of its existence under Article 1 of the Charter.

To sum up, I think that the United Nations intervention in the case of the Middle East derives from resolutions which are intrinsically valid from the point of view of the competence of the organ concerned. Although the Security Council did not take part in the matter, there were quite exceptional reasons which justified the General Assembly's intervention. The latter was therefore competent to act. This holds for the period from 31 October to 24 November 1956, the date of the last basic resolution No. 1121 in the dossier. As from that date, the situation needs to be considered from a new point of view. Since the United Kingdom and France agreed to abandon their armed action against Egypt and to withdraw their forces, the bar to their participation as permanent Members of the Security Council no longer existed, and the Council therefore became once more the competent organ to take decisions concerning the functioning of the Emergency Force and the continuation of United Nations action in the Israel-Palestine question. So far as I know, the Security Council did not intervene; perhaps by virtue of the theory of the non-applicability of Article 43 of the Charter and of the competence of the Assembly to act in respect of actions not of an enforcement nature. But this question will be dealt with further on.

(b) Another question closely related to the foregoing refers to the spheres of competence of the Security Council and the General Assembly from the point of view of *action* for the maintenance of peace. It is the Security Council—it is said—which is the only organ having the right to take *action* (Articles 24; 35, para. 3; and 39-43). The General Assembly is expressly forbidden to take action (Article 11, para. 2, last part; and Article 35, para. 3). In this respect the Assembly only has the power to discuss or make recommendations (Articles 10; 11, para, 2; and 14) and to call the Security Council's attention to situations which seem to be danger-

ous (Article 11, para. 3). Nonetheless—it is alleged—in the case of the Middle East it was the Assembly which took the responsibility for authorizing the *military action* and, further, which created a special United Nations Emergency Force to carry out the operation, although this step was not expressly provided for in the Charter. In the case of the Congo, while it was the Security Council which decided on military assistance under the supervision of the Secretary-General, it was the General Assembly which undertook the application of this measure regarding the support and financing of ONUC, the latter being an auxiliary force not provided for in the Charter.

With regard to these observations, an interpretation is required of the sense in which the word "*action*" is used in the provisions of the Charter.

It may be mentioned that, in other fields, the General Assembly may take certain clearly defined *actions*, for instance the admission of new Members (Article 4), the suspension and expulsion of a Member (Articles 5 and 6), the performance of functions with respect to the international trusteeship system (Article 16) or the Economic and Social Council (Articles 18 and 86 ff.), and administrative and budgetary questions (Article 17).

It remains to be considered whether there are other examples of actions which the Assembly might take, without violation of the Charter, in the peace-keeping field.

In Article 11, paragraph 2, the Charter adds no adjective to the word "action", no qualification indicating the specific character of the Security Council's action. What then is the nature of the action which the Charter entrusts to the Council as something within its *exclusive* competence, as something prohibited for the Assembly under Article 11, paragraph 2, and Article 35, paragraph 3?

It may at once be said that the action allotted to the Council is not exclusively *military* action. I base myself on the text of Article 35, paragraph 3, which refers to the pacific settlement of disputes (Chapter VI of the Charter). Here, no actual conflict has yet taken place, no factual situation which calls for the use of armed force; it is so far only a matter of disputes which in the future, possibly a distant future, might lead to a threat to the peace. Nonetheless, in such cases, it is the Council and not the Assembly (Article 35, para. 3) which is to take action, not indeed military action, but good offices, mediation, invitation to arbitrate or submit for international judicial settlement, etc., all of which are strengthened by a certain moral compulsion (Article 33 *et seq.*).

If military action is not the only type of action within the power of the Council, what then is the type of action which the Charter confers on the Council and what are its distinguishing features? It would be possible to attempt to elaborate a theoretical conception

which might enable the General Assembly to embark on a course of *action*. The solution may perhaps be found in Articles 1 (para. 1), 2 (paras. 2, 3, 4, 5), 5, 6, 24 (paras. 1 and 2), 33, 36 (para. 3), 37, 39-44 and 48 of the Charter. All these provisions imply on the part of Member States certain partial and contractual renunciations in respect of the exercise of their own sovereignty—which indeed is fully recognized by Article 2 (paras. 1 and 7)—in the interests of international co-operation and peace. Furthermore, some of these articles imply on the part of States Members the *a priori* recognition of the Organization's rights to exercise upon them its comminatory authority to compel them to fulfil the obligations of the Charter. This authority runs from moral pressure (Article 33, para. 2; Article 36, para. 1; Article 37, para. 2), through economic and diplomatic pressure (Article 41), to preventive armed intervention (Article 42) and the use of force (Article 43). All this comprises *enforcement action* under its two aspects of prevention or imperative admonition, and punishment. Such is the gravely responsible function which the Charter has entrusted to the Security Council, where the five Great Powers of the world have permanent seats. Only in the case of Articles 5 and 6 (institutional punishment) is the principle mitigated and does the Assembly take part, side by side with the Council, in the punitive function.

Seeking to establish the difference between this power of action of the Security Council and the powers of the General Assembly, I would say that the latter are of a kind to respect always and under all circumstances the limitations imposed by State sovereignty; and that is why the Assembly's role is confined to discussions, petitions, recommendations and actions of limited scope. But when a crisis in the matter of peace occurs, the international community finds itself in an abnormal situation; and then, by virtue of the contractual rules of the Charter, the sovereign interests of particular States come below the more fundamental interests of the community, and the Security Council has the power to resort to compulsion and even to force so as to restore order.

This interpretation of the meaning of the *action* which the Charter mentions as one of the attributes of the Security Council simplifies the solution of problems affecting the maintenance of peace. The Council's action presupposes the existence of a State which has committed an infringement, and hence the possibility of an *authoritative* or *comminatory* decision by the Council. There is in addition, in these serious cases, lack of compliance on the part of the infringing State, and consequently *enforcement* action *against* it, including the use of force. At this stage, the consent of the State which is responsible is ignored, and the Council may act against the will of that State.

If this interpretation can be accepted, it is easier to understand the General Assembly's attitude in the case of the Middle East, as

expressed and explained in the Secretary-General's reports [1]. No doubt, if military assistance had been asked for by the Egyptian Government, if France and the United Kingdom had agreed to abandon their policy of force, and if Israel had stopped its invasion, then the *action* undertaken by the United Nations would not, it is asserted, have involved real belligerence *against* a State within the meaning of Article 43 of the Charter, but would—by mutual agreement—have become action, other than enforcement action, of security and supervision, taken in conformity with Article 14, with a view to supervising the withdrawal of the troops and the re-establishment of the armistice line. It is in this way that it has been sought to justify the dispatch of the Emergency Force.

However, this distinction between enforcement action and armed action which is not coercive but simply police or security action is perhaps too subtle for the second of these to be assigned to the General Assembly. For that, a specific addition to or an amendment of the Charter, made by the competent organ of the United Nations, would perhaps be required. After all, this has reference to a military mobilization action on foreign territory, which is always liable to cause complications, which has in fact occurred on occasion. It is only the consideration of this exceptional circumstance of the Security Council's paralysis in the particular case of Egypt which makes the matter clearer and lessens the doubts which I have referred to. In this connection, reference has been made to the precedent of other similar interventions by the General Assembly, which are said to have constituted a reaffirmation of the scope of the Assembly's peace-keeping powers. Among these interventions have been mentioned the establishment of a Special Committee on the Balkans (October 1947), of the Commission for the Unification of Korea (October 1950), and of the observation group in the Lebanon (June 1958). It is for the Organization to appraise the pertinence and the weight of these precedents.

In the case of the Congo, the military action was ordered by the Security Council and not by the General Assembly. Hence no problem arises as to the validity of the resolutions initiating the action. One may perhaps arise with regard to its continuance in new and complex circumstances. The presence of ONUC in the Congo having continued, financial resolutions by the General Assembly followed one another indefinitely and gave rise to objections on the part of certain States.

To sum up, it may be asserted that in the cases of the Middle East and the Congo a definition by a competent authority of the United Nations is indispensable of the nature of the *action* under-

[1] Document A/3267, 3 November 1956, p. 3; Document A/3287, 4 November, p. 11; Document A/3289, 4 November, p. 15; all these documents are included in the volume of annexes of the first Emergency Special Session, 749th and 750th meetings of the Security Council, dated 30 October 1956—Dossier of the United Nations Secretariat, Document No. 132.

taken by UNEF and ONUC (enforcement action or mere security policing); and also of the scope of the obligations of States Members in respect of this type of armed expedition—not provided for in the Charter—which are not imposed by the Security Council under Article 43 of the Charter, but which emanate from decisions of the Security Council or from recommendations by it and by the General Assembly with a view to carrying out, with the consent of the States interested, a mere action of police control without enforcement character.

(c) The Charter—it is asserted—has been violated because the Organization has intervened in the domestic affairs of the Republic of the Congo in spite of the provision of Article 2, paragraphs 1 and 7. In fact, it is added, one of the purposes of the armed action authorized by the Security Council (resolutions of 14 and 22 July and 8 August 1960, and 21 February and 24 November 1961) was to supply the Government of the Congo with the military assistance which it needed to restore internal law and order and, subsequently, to stamp out the secessionist movement of Katanga province; but these two objectives—it is said—come clearly within the exclusive competence of the local government and the Congolese people.

The view taken by the Security Council establishes a close connection between the maintenance of internal law and order and the maintenance of international peace and security, in view of the presence of Belgian troops and the influence of complex interests within the country. It was added that since the Congo was a new Republic, only recently having become a Member of the United Nations, it should receive from the Organization all the assistance which it has asked for to achieve its normal formation as a State (Article 1, para. 3, of the Charter). Finally, it was said that the political constitution of the new State was founded upon the principle of the confederal unity of the various provinces, of which Katanga was one; and that, not having yet completed either its constitutional "process" or the organization of its national powers with the participation of the representatives of all the provinces, any kind of movement against the *loi fondamentale* was premature and called for condemnation by the international community.

This broadened interpretation of the new tutelary functions of the United Nations in respect of new States clearly contains a theory which is a noble conception from the humanitarian and civic point of view; but the scope of this theory must first be reconciled by the Organization with the principle laid down by Article 2, paragraphs 1 and 7, and likewise with the financial possibilities of States Members. That is the question which has to be solved.

As to the principle of non-intervention in matters within the domestic jurisdiction, it is beyond dispute that the Organization has not in fact committed any infringement in the case of the Congo, since it was the Government of that State which, on its own initiative, asked for the assistance of the United Nations. But the question

is not so simple from the financing point of view. These new financial obligations of Member States were not contemplated in the Charter. Hence it is doubtful whether a contractual obligation to pay exists. It may be said that the policy of assisting the Congo to settle its domestic affairs was adopted in the spirit of Articles 1 (paragraph 3) and 55 (paragraphs *(b)* and *(c)*) of the Charter; but in the field of international co-operation, expenses are met by means of voluntary contributions and are not compulsorily apportioned among all States. In any case, some general interpretative decision on the part of the Organization is lacking on this subject.

(d) The States which raised objections to the expenditures in question contend that there has been a violation of the Charter because the execution of armed actions in the Middle East and the Congo was not made the military and financial responsibility of a State or group of States under "special agreements" signed with them by the Security Council (Article 43), but that the actions in question were taken in hand directly by the General Assembly, and therefore placed under the responsibility of the Organization and entrusted to a special United Nations Force, for which there is no provision in the Charter.

To understand and evaluate this objection, two questions must be considered: one of law and one of fact.

The legal question is whether the negotiation of "special agreements" is, according to the spirit of the Charter, such a basic one that, if such agreements are not concluded, the action ordered should not be undertaken. I incline not to think so. In practice it may occur that the State or group of States called upon to supply armed assistance cannot do so at once or decline to accept the responsibility. In the theory of the Charter—it should be noted—there is no provision for such refusal but, in any case, that would be sufficient to frustrate the decision of the United Nations to maintain or re-establish peace. In that event, the Security Council must fill the gap by means of direct measures. The principle of "institutional effectiveness" which the Court has applied on certain occasions (*Reports*, Advisory Opinion of 11 April 1949) indicates that the Organization may, in such circumstances, seek in the spirit of the Charter the effective means of attaining its purposes (Article 1). No other means would appear to be available to the Organization but the formation of a special Force for the operations.

One more point remains to be cleared up: are the States called upon to intervene, by means of the "special agreements" mentioned in Article 43, only States which are Members of the Security Council or only its permanent Members, or can they be any other Member States of the Organization? Undoubtedly, the view favourable to the first two hypotheses has been put forward and may find support in the fact that the Members of the Council are the responsible parties before the whole world in decisions on peace and war; and

also in the fact that the permanent Members represent the most important centre of gravity within the international community from the point of view of power and resources. But the text of Articles 43 and 45, in agreement with Article 2, paragraph 2, and Articles 17, 24 (paragraph 1) and 25 of the Charter, in my opinion, make it possible to recognize an obligation on *all* States to answer, if necessary, the call of the Security Council to participate in "special agreements". That is another question where a decision by the United Nations is expected by the objecting States.

As to the question of fact, it seems to me that a mistake has been made when it is stated, with regard to the Middle East and Congo, that "special agreements" were not entered into. Several States replied favourably to the Secretary-General's request to supply troops for the United Nations expedition in Egypt [1]; and several of these countries did in fact send troops and, probably, signed partial agreements stipulating the conditions of their assistance. A similar situation arose in the case of the Congo, when the Secretary-General reached agreement with several African States for the provision of troops. It cannot therefore be said that the rule as regards "special agreements" has been violated. The distinguishing feature is that the carrying out of the armed action was not entrusted *wholly* to a single State or to a group of States as laid down in Article 43, but rather it was the United Nations which contributed as an organization a large share of the expenses and which created an Emergency Force which was independent but made up of the national contingents of several States and supplied by them with arms, equipment, means of transport, etc., under special agreements. Obviously, this type of United Nations force is not mentioned in Article 43 and its origin must be sought in the notion strongly upheld in the Assembly and the Secretariat that the cases of the Middle East and the Congo were not cases coming under Chapter VII of the Charter (threats to the peace, breaches of the peace, and acts of aggression), but actions of security and supervision freely accepted by the parties concerned, having no enforcement character. As an element of these actions, the creation of the Emergency Force was held—in the opinion of the Assembly and the Secretariat—to come within the power of the General Assembly to establish secondary organs (Articles 14 and 22). In this view there would be no obligation—so it has been maintained—to have regard only to the provision of Article 43 with regard to "special agreements".

The reservations which I have expressed on the scope of the General Assembly's power of *action* are equally relevant here. And I

[1] *Official Records*, Annexes, 11th Session of the General Assembly, continuation of agenda item 5 of the first emergency special session (1-10 November 1956), New York, 1956-1957—No. 153 of the dossier transmitted to the Court by the Secretariat of the United Nations.

must also make reservations as to whether a military force may be described as a "subsidiary organ" of the United Nations, since institutional organs presuppose a certain discretionary capacity of thought if they are to fulfil conscientiously the duty assigned to them, and a military force lacks all deliberative powers and is simply a disciplined executive *instrument* of orders from on high. The Assembly would, no doubt, be able to create such an *instrument of action*—endeavouring to overcome bureaucratic objections—if the fundamental problem were first resolved in its favour, that is to say if it were recognized that, leaving aside Article 43, there were certain categories of military or para-military non-belligerent *actions* which it could take up, independently of the Security Council and outside the special agreements. No unwritten amendment of the Charter on this subject has so far in my opinion been made because, from the first moment, the idea was objected to by several States Members, which rejected the innovation. This reluctance is closely bound up with another objection of a financial character, which I shall now consider.

(e) The objection considered in the foregoing paragraph concerns the political aspect of the absence of "special agreements" and their replacement by the Emergency Force of the United Nations in the cases of the Middle East and the Congo. But the objection has a wider bearing and concerns at the same time the financial aspect of the actions undertaken for the maintenance of peace. In the opinion of certain States, the expenditures on this type of armed action should be borne exclusively by the State or group of States called upon to carry out the action in accordance with "special agreements" previously signed under Article 43; but not by all States Members, as the practice of the General Assembly seeks to establish. Certain States go further and take the view that, in accordance with the spirit of the Charter, only Members of the Security Council and particularly its permanent Members, should be required to sign and to finance "special agreements" effecting armed operations by the Organization, taking into consideration:

(a) the primary responsibility for the maintenance of peace assigned by the Charter to Members of the Council;

(b) their decisive intervention in decisions concerning armed action by the Organization (Articles 24, 25 and 39-43);

(c) the great share of authority which the Charter allots to permanent Members in the political direction of the Organization (Article 27, para. 3).

Other, additional, criteria have been put forward, namely:

(d) the special responsibility of States which have a direct interest in the pacification of the territory affected by the conflict;

(e) the liability of the State or States which caused the disturbance of the peace.

That is why, during debates in the various organs of the United Nations, there was much discussion of the question whether the expenses incurred by the application of resolutions authorizing armed *actions* are included or not in the "expenses of the Organization" within the meaning of Article 17, paragraph 2. Several Member States gave a negative reply to this question, and maintained that expenditure on armed action is subject to special rules different from the ordinary one laid down in paragraph 2 of that Article. This view leads one to consider whether, in the intention of Article 43, the "special agreements" presuppose that the financial burden of each armed intervention will always fall completely and exclusively on the State or group of States whose assistance has been asked for; or whether this expenditure may be shared between those individual States and the Organization as such; or borne by the Organization alone. In the absence of any express rule—the Charter itself is not explicit on the matter—I think that a consideration of the general context of Article 43 bears in favour of the second interpretation. It is in fact laid down in paragraph 2 of that Article that the "agreements" shall govern not only the numbers and types of forces, etc., but also *"the nature of the ... assistance to be provided"*—that is to say, in my view, whether this assistance shall be free or paid for, or a mixture of both, and in what proportion. And if this assistance is to be paid for wholly or partly by the Organization, the amount which the latter bears will in principle constitute an "expense of the Organization" within the meaning of Article 17, paragraph 2, of the Charter. The case has also to be contemplated in which the State or States called upon to carry out the armed action are not able to do so or to sign "special agreements", the Organization itself in that case undertaking the carrying out of the action. Furthermore, the text of Article 43, paragraph 1, and that of Article 2, paragraph 4, and Articles 45 and 48 in principle places the responsibility for the maintenance of peace and consequently the responsibility for the expenditure on all Member States.

A particular and an important aspect of the objections raised to the inclusion in Article 17, paragraph 2, of expenditure for the maintenance of peace is the amount—every day a larger amount—of that expenditure, in view of the great extension of the armed interventions of the United Nations to preserve or restore peace. This refers not only to the enforcement operations coming under Article 43 of the Charter, but to any kind of armed action giving rise to expenditure borne by the Organization; which is exactly the case of the armed interventions described as not of an enforcement but of a police character, such as those of the United Nations Forces (UNEF and ONUC), a large proportion of the expenditure on which has fallen upon the Organization.

Certain Member States have, in this connection, maintained that it is impossible for them in their national budgets to meet the international obligations for the defence of peace, since the cost of these goes beyond the economic capacities and the fiscal resources of their countries. This argument carries particular weight with regard to under-developed countries, whose primordial duty is to care for the fundamental needs of their own population. It is maintained that the continual increase in military operations of this nature from the promulgation of the Charter up to the present time constitutes a new factor which has created equally new circumstances, and that these should be taken into consideration from a legal point of view so as to safeguard equity and the interests of the contracting parties. France has indeed maintained that to seek to make the financial decisions of the Assembly prevail over the will of the parliamentary authority of each State would amount to admitting the existence in the United Nations of a supranational power which would be in conflict with the Charter (Article 2, paras. 1 and 7). These assertions undoubtedly deserve very thorough consideration. It is not merely a question of *quantity*, for this real conflict of powers and obligations between two public law persons must not be underestimated.

It is clear to me that, at the time of the signature of the Charter, none of the States Members could have foreseen that the obligations which they acknowledged in respect of the Organization could one day conflict with their obligations under municipal law vis-à-vis their national communities. Nobody foresaw that the increase in expenditure of the United Nations could one day endanger the solvency of national budgets. But since this state of affairs has arisen subsequently to the coming into force of the Charter, it is obvious that such a new factor calls for very special consideration by the competent organ of the Organization. The apportionment of assessments according to the system of budgetary scales has been the subject of continual criticisms. Some more explicit and formal compromise between the budgetary necessities of the United Nations and the constitutional problem of the objecting States must therefore be arrived at, so as to incorporate in the Charter settlement some further rule covering the new situation. In the meantime, the case not having been foreseen and not coming under any specific pre-established agreement, it is not clear by virtue of what principle of law the obligation to meet this type of expenditure *ultra pacte* could be invoked. To declare, in these circumstances, that these types of expenditure are expenses of the Organization, before there is any special regulation in the matter, would in my view be an extremely serious step: it would amount to placing certain States before the dilemma of failing in their duties to the Organization or of acting to the detriment of their own domestic law.

The General Assembly has seen the full importance of this problem, as also the difficulties which it involves, and it has—I believe—

begun to face it. It has introduced into the preamble of its most recent financial resolutions some of the new criteria which have been suggested regarding the different degrees of responsibility of certain States Members in meeting the expenditure incurred in peace-keeping operations. But the adoption of a special method taking such criteria into consideration has not yet come to a satisfactory conclusion although indeed resolution 1619 (XV) of 21 April 1961 announced an intermediate solution, namely the establishment of a new scale of assessments for the extraordinary expenditure incurred in these operations.

(f) The Secretary-General has been reproached with having violated the Charter, in connection with the Middle East and Congo conflicts, by discharging functions and responsibilities which belong to the Security Council or to the General Assembly. But, in this respect, regard must be had not only to Articles 22 and 29 of the Charter, which enable those organs to establish subsidiary executive organs, but also to Article 98, under which the Secretary-General, over and above his own functions, shall perform such other functions as are entrusted to him by "the General Assembly, the Security Council, the Economic and Social Council and the Trusteeship Council". The General Assembly in its resolutions of 1956, and the Security Council in its resolutions of 1960 and 1961, expressly charged the Secretary-General with the implementation of their decisions regarding armed action in the two countries. In the case of such mandates, the Secretary-General acted in the name of and on behalf of the mandators. There is therefore no usurpation of functions, unless it is shown that the Secretary-General has gone beyond his rights in the exercise of his mandate.

5. From the foregoing examination it follows *in principle*—that is to say, by a *theoretical* interpretation of the Charter and without contemplating any specific case—that it may be affirmed that the expenses incurred by armed actions legally undertaken for the maintenance of peace are expenses of the Organization within the meaning of Article 17, paragraph 2. But, according to the view of certain Member States, it equally follows that in the Middle East and Congo conflicts, special circumstances *of fact* arose, because of which resolutions were adopted by the organs of the United Nations involving infringements of the Charter. In these circumstances—they say—no reliance can be placed as against Member States on obligations deriving from resolutions which are not lawful.

Here is the point where a definintion is required. And it is not the Court which can help to find it, since the request for an advisory opinion does not include the question of the legality or the validity of the resolutions to which it refers. I shall therefore confine myself to certain observations regarding this deadlock, so as to explain my views as to the answer to be given to the request.

The United Nations is an association of States in which the rights and the obligations of the Members are contractually prescribed in its constituent charter. It is the Charter which governs the mutual relations of the associates and their relations with the Organization itself. Only because of their acceptance of the purposes of the Charter and the guarantees therein laid down have the States Members partially limited the scope of their sovereign powers (Article 2). It goes without saying, therefore, that the real reason for the obedience of States Members to the authorities of the Organization is the conformity of the mandates of its competent organs with the text of the Charter. This principle of the conditional link between the duty to accept institutional decisions and the conformity of those decisions with the Charter is enshrined in Article 25, which, although referring explicitly to the Security Council, in my opinion lays down a fundamental basic rule which is generally applicable to the whole system of the Charter. Article 2, paragraph 2, confirms this interpretation.

There is therefore a legal presumption that each of the organs of the Organization is careful in its actions to comply with the prescriptions of the Charter; but when, in the opinion of one of the Member States, a mistake of interpretation has been made or there has even been an infringement of the Charter, there is a right to challenge the resolution in which the error has been noted for the purpose of determining whether or not it departed from the Charter.

It cannot be maintained that the resolutions of any organ of the United Nations are not subject to review: that would amount to declaring the pointlessness of the Charter or its absolute subordination to the judgment—always fallible—of the organs.

But the case of the United Nations is clearly a special one. Having regard to the fact that it is the highest international institution as being an association of sovereign States, its unfettered autonomy is subject to no higher tribunal capable of reviewing its acts. It is the institution itself which has the power to rectify or to confirm them. That is probably why no provision was made in the Charter for any supervisory organ to determine legality or conformity with the Charter, such as some tribunal to which it would be possible to refer—in the manner of judicial proceedings—the objection of a Member State to a decision of the Organization. But that in no way excludes the Organization's function of dealing with complaints by its Members. And I think I find evidence that that was the intention of the Charter in the text of its Article 96, which makes provision for the advice of the International Court of Justice on legal questions. An advisory opinion, taking the place of judicial proceedings, is a method of voluntary recourse which, if only by way of elucidation, precedes the decision which the Organization is called upon to give with regard to legal objections raised by Member States.

In respect of the Middle East and the Congo, observations have been made by certain States on various matters: some of them stating that certain resolutions of the General Assembly or the Security Council are not in conformity with the Charter; others pointing out possible mistakes of interpretation of the Charter which have imposed on all Member States obligations for which there should not be general responsibility; others, again, asking that the Organization should lay down rules on matters for which there is no provision in the Charter. The non-obligatory character of decisions which result from a mere recommendation and not from an imperative mandate by a principal organ has also been pointed out. This attitude on the part of certain States derives from an inherent right of all members of associations which have a body of rules to which the acts of the institution have to conform. This principle of conformity with the rules is, one must not forget, the basis for a contractual obligation. The fact that, faced with this number of objections, the General Assembly has asked for the legal opinion of the Court is—in my view—the best proof that this organ of the United Nations intends to decide in accordance with law the objections put forward by several of its Members and—perhaps—to embark upon a review or adaptation of the Charter to the new circumstances. Meantime, it is not possible to determine whether, with regard to the objecting States, the expenditures incurred in the operations in Egypt and the Congo are lawful expenses and, accordingly, expenses of the Organization.

It might be said that the resolutions objected to having been adopted by the majority required by the Charter (Article 18, para. 2, and Article 27, para. 3) are legally valid and indeed binding on all Member States, although some of them voted *against* or did not take part in the vote. This is, indeed, the general principle which governs the agreements of any association with a view to guaranteeing institutional unity and efficacity. But that refers only to the *formal* or external legality and not to the intrinsic validity of the resolutions. Non-conformity with the Charter is a question of intrinsic legality which may be raised by States Members even though the formal legality may be indisputable. An objection to the substantive legality relates to the very existence of an obligation, since the very existence of a contractual bond is in issue.

Furthermore, the Organization must pronounce on the allegation that resolutions which approve mere recommendations of the Assembly or the Security Council do not have obligatory effect for States which have not accepted them. This is a special feature of the system of the United Nations as to which nothing is defined in the Charter. What would be the difference between an *imperative* resolution of the Security Council and another involving simply a *recommendation* of the Assembly or of the Council itself? Does the recommendation become binding on all, by virtue of the approval

of the majority? The word recommendation implies suggestion, advice, advisability, usefulness, but not an order or an imperative mandate. Logically, suggestion or advice cannot normally be transformed into an obligation. It is the question which has to be determined.

Turning to another aspect of the matter, it has been said that the General Assembly's resolutions regarding the commitment of resources for the operations in the Middle East and in the Congo or the financing of operational expenditures ("derived" resolutions) are themselves independent and ought not to be considered as depending on the *basic* resolutions which authorize military operations. Each organ of the United Nations—it is said—is the judge of its own competence; and the financial resolutions of the Assembly have, in themselves, a binding force which proceeds from the authority and the judgment of this organ, independently of the connection with the basic resolutions. A legal defect of any kind which might affect these last resolutions would not, therefore, communicate its defect to the financial resolutions of the Assembly. I do not agree with this view. One cannot demolish by this type of reasoning the substantial and objective connection of cause and effect between the resolution authorizing armed action and a resolution providing for funds to cover the expenditure involved. The legitimacy of the Assembly's competence to fulfil its duty of financing the Organization's expenses is one thing; whether the purpose of the expenses and the method of financing are or are not in conformity with the Charter is a very different matter. An examination of this latter question is in my opinion permissible with regard to all types of resolution. Moreover, some of the objections raised cover, not only the *basic* resolutions but also in a direct fashion those of a financial nature, with regard to the apportionment of the burden of the expenses among all the States.

A complication with regard to the financial resolutions lies in the fact that many of them lay down the obligation to pay, by way of reimbursement, for certain expenses met out of credits supplied by third parties. Both the honour and the good faith of the Organization require the discharge of this type of obligation, even if it originated in defective or unlawful resolutions. I think that the solution is to be found in the general system of the Charter itself. If the resolutions were adopted according to the prescribed forms, by the majority of Member States required by the Charter, there is a provisional presumption of legality in favour of these decisions. The isolated cases of allegations on the part of some State or States against the validity or conformity with the Charter of such resolutions should also be decided by the competent organ at the appropriate time; but in the meantime the effects of the resolutions towards third parties should remain intact. Two possible solutions may be considered: either the performance of the obligations is borne by the States which explicitly or implicitly accepted the re-

solution in question; or the responsibility is ascribed to all State Members—and, in the latter case, after the settlement of objections put forward by any State, internal arrangements of compensation may be made if the decision is in favour of the objecting State. The first solution might principally be applied when it is a question of resolutions deriving from simple recommendations, and the second solution when the obligation derives from an imperative mandate by the competent organ.

6. What I have said above suffices, I think, to explain why I cannot reply simply *yes* or *no* to the question put in the request for an advisory opinion, since in my view a substantial element of appraisement is lacking, namely the ascertainment of the conformity or non-conformity with the Charter of certain resolutions mentioned in the request, which have been the subject of legal objections on the part of various Member States.

From my present statement it is possible to infer my own judgment with regard to these objections, some of which in my opinion are ill founded, while there are serious reasons in support of others. In any case, I think it indispensable to seek a legal definition which decides as to the legality of all these objections or which expressly governs situations not provided for in the Charter or having arisen after the promulgation of the Charter. We are faced with a situation of uncertainty which cannot be ignored. The financial crisis which has occurred within the Organization is only the reflection of another crisis the subject of which is the very substance of the Charter. But the fact is that the Court has not to pronounce on this subject, not only because of the character of this advisory opinion (which is an opinion, not a judgment) but also because the question put to us for an opinion is limited entirely to determining whether the expenditures in the Middle East and in the Congo constitute or do not constitute "expenses of the Organization", without reference to the aspect of the legality of those expenditures.

Thus, I repeat what I have said above: in principle, I am of opinion that expenditures validly authorized by the competent organ for the carrying out of an armed action with the purpose of maintaining international peace and security constitute "expenses of the Organization". But in the case of the expenditures authorized for the operations in the Middle East and the Congo, it is for the competent organ of the United Nations to pronounce on the legal objections put forward by certain States against the relevant resolutions. Only after this pronouncement on the legality or the non-legality of these resolutions would, in my opinion, a reply to the request be possible.

In consequence, I conclude that the expenditures referred to in the request for an advisory opinion would constitute expenses of the Organization if, after consideration of the legal objections

raised by certain Member States, the competent organ of the United Nations succeeds in determining as *legal* and *valid* the resolutions by virtue of which the expenses in question were incurred.

Since this definition has not been given and having regard to the limitations of the request, the Court—in my view—cannot declare whether the expenditures in question are or are not expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter. But if the Court must in voting reply categorically "yes" or "no" to the question put in the request, my reply can only be negative for, according to the foregoing, I am not in a position to assume the responsibility for an affirmative characterization of the legality of the expenditures.

(Signed) J. L. BUSTAMANTE.