SEPARATE OPINION OF JUDGE REZEK

[Translation]

1. Since the respondent State, in challenging as it has both the jurisdiction of the Court and the admissibility of the Application, has laid emphasis on the binding and paramount nature of Security Council resolutions 748 (1992) and 883 (1993) in the light of Articles 25 and 103 of the Charter of the United Nations, in my opinion the Judgment, with which I agree, would more fully convey the lines of argument advanced by the Parties were it to devote a few comments to the subject of the jurisdiction of the Court in relation to that of the political organs of the Organization.

2. Article 103 of the Charter is a rule for settling conflicts between treaties: above all it postulates a conflict between the Charter of the United Nations and another treaty obligation. It settles the conflict in the Charter's favour, regardless of the chronology of the texts. However, it is not designed to operate to the detriment of customary international law and even less so to the detriment of the general principles of the law of nations. Moreover, it is definitely the Charter of the United Nations (not a Security Council resolution, nor a General Assembly recommendation, nor a judgment of the International Court of Justice) which benefits from the primacy established in this norm: it is the Charter with the full significance of its principles, its system and the division of powers which it establishes.

3. Furthermore, the Court is the definitive interpreter of the Charter of the United Nations. It is the Court's responsibility to determine the meaning of each of its provisions and of the text as a whole, and this responsibility becomes particularly serious when the Court finds itself faced with a challenge to decisions taken by one of the Organization's two principal political organs. Ensuring the primacy of the Charter in its true and full meaning is one of the most eminent of the tasks which fall to the Court, and the Court, as of right and out of duty, acts to that end whenever the occasion arises, even if this may in theory result in criticism of another organ of the United Nations, or rather in disavowal of that organ's analysis of the Charter.

At the time of the *East Timor* case, Judge Skubiszewski had occasion to recall that:

> "The Court is competent, and this is shown by several judgments and advisory opinions, to interpret and apply the resolutions of the Organization. The Court is competent to make findings on their lawfulness, in particular whether they were *intra vires*. This competence

follows from its function as the principal judicial organ of the United Nations. The decisions of the Organization (in the broad sense which this notion has under the Charter provisions on voting) are subject to scrutiny by the Court with regard to their legality, validity and effect. The pronouncements of the Court on these matters involve the interests of all Member States or at any rate those which are the addressees of the relevant resolutions. Yet these pronouncements remain within the limits of *Monetary Gold*. By assessing the various United Nations resolutions on East Timor in relation to the rights and duties of Australia the Court would not be breaking the rule of the consensual basis of its jurisdiction." (*I.C.J. Reports 1995*, p. 251.)

In the past, judges as measured as Sir Gerald Fitzmaurice have asserted this jurisdiction, and in this they were supported by the authority of doctrine. As Professor Oliver Lissitzyn wrote years ago:

"If the organization is to gain strength, the authority to give binding interpretations of the Charter, at least in matters directly affecting the rights and duties of states, must be lodged somewhere, preferably in a judicial organ. The long-range purposes and policies laid down in the Charter must be given some protection against the possible short-range aberrations of the political organs. Power without law is despotism." (O. J. Lissitzyn, *The International Court of Justice*, 1951, pp. 96-97.)

The argument that judicial scrutiny of a political organ's interpretation of the Charter can only take place in the exercise of advisory jurisdiction is totally without scientific foundation. What is true is only that the system does not authorize any State either to consult the Court on a constitutional issue involving the United Nations or to raise such an issue by means of *direct* action against the Organization or against an organ such as the Security Council. However, the constitutional issue — relating, say, to a case of *excès de pouvoir* — can perfectly well arise in the context of a dispute between States. It is quite natural, within such a framework, that an application should be directed against a State which, for some reason, has taken it upon itself to execute the Council's act although that act was challenged from the viewpoint of the Charter or of any rule of general international law. The respondent in the proceedings, therefore, is not the legislator but the immediate executor of the law, as is normally the case in domestic jurisdictions within the framework of a procedure of *habeas corpus* and in the context of civil actions for the protection of rights other than individual freedoms.

4. The Court has full jurisdiction to interpret and apply the law in a

contentious case, even when the exercise of such jurisdiction might entail the critical scrutiny of a decision of another organ of the United Nations. It does not directly represent the States Members of the Organization (this fact has been stated before the Court and attempts have been made to infer from it the consequence that the Court is not competent to undertake a review of resolutions of the Council), but precisely because it is impermeable to political injunctions the Court is the interpreter par excellence of the law and the natural forum for reviewing the acts of political organs in the name of the law, as is the rule in democratic régimes. It would be surprising indeed if the Security Council of the United Nations were to enjoy absolute and unchallengeable power in respect of the rule of law, a privilege not enjoyed, in domestic law, by the political organs of most of the founding Members and other Members of the Organization, starting with the respondent State.

It is the States Members of the United Nations, within the General Assembly and the Security Council, which have the power to legislate, to change if they so wish the rules that govern the working of the Organization. In the exercise of their legislative function they may decide, for example, that the Organization can do without a judicial organ, or that this organ, contrary to national models, is not the ultimate interpreter of the legal order of the Organization in matters which touch upon the validity of a decision of another organ of the system. To my knowledge, they have never even considered doing so and the Court should not, I think, hold back from asserting a prerogative it enjoys on the basis of the presumed will of the United Nations.

(Signed) Francisco REZEK.