

DISSENTING OPINION OF JUDGE BASDEVANT

[Translation]

In accordance with Article 65, paragraph 2, of the Statute of the Court, the request asking the Court to give an advisory opinion must contain "an exact statement of the question upon which an opinion is required". It is in these circumstances and on that basis that, under Article 65, paragraph 1, the Court "may give an advisory opinion".

This provision has not been complied with.

The request for an opinion starts from a given factual element, namely the existence of "expenditures authorized in General Assembly resolutions". As stated the request for an opinion does not determine whether the Court should purely and simply start from the existence of "expenditures authorized" or whether it should first of all ascertain whether those expenditures were properly authorized by the General Assembly. If the Court is purely and simply to start from the existence of "expenditures authorized" the reply to the question put would appear to be fairly simple: the expenditures were an element of the activity of the United Nations as such, they were incurred and made under its responsibility, and they thereby became expenses of the Organization. Reference to the activities of the United Nations in making these expenditures may be understood as being the sense in which the request for an opinion was formulated. This request relates to expenditures made up to the end of 1961. Nothing is contemplated or, still less, expressly stated, as regards expenditures made subsequent to 1 January 1962. An enquiry into whether the former were decided upon and authorized in accordance with a particular provision of the Charter may have seemed to have no practical significance, the expenditures having already been made. The question of the financing of those expenditures, of their apportionment among the States Members of the United Nations, and of the contribution to be borne by them would then arise, but this question has not been included in the request for opinion. That request may be understood as asking the Court whether the "expenditures authorized" which are submitted to it constitute "expenses of the Organization".

But the factual element set forth in the request for opinion may also be construed as including a legal question, namely: were the authorized expenditures referred to authorized in a proper manner? This question occupied a substantial place in the oral proceedings before the Court and, consequently, in the Opinion. In noting this I am by that very fact compelled also to note that the request for opinion did not, on this essential point, comply with Article 65,

paragraph 2, of the Statute which requires "an exact statement of the question upon which an opinion is required".

After this inadequacy regarding the indication of the factual element which the Court must take as its point of departure, the Court was faced with an even more serious uncertainty in the course and at the end of the examination which it was invited to undertake.

The Court is in the position of having been invited to determine whether the "expenditures authorized" submitted to it deserve the legal characterization of "expenses of the Organization". The request provides no criterion enabling this characterization to be defined more explicitly. It confines itself to quoting this term and adding "within the meaning of Article 17, paragraph 2, of the Charter of the United Nations". These additional words add nothing concerning the actual meaning of the term used, but simply set forth the consequences which the General Assembly may attach to these expenses when it comes to exercise its powers of apportionment. In using the term "expenses of the Organization" under consideration neither Article 17, paragraph 2, nor the request state what is comprised in the term.

The Court has not deemed it possible to confine itself to this reference. At the outset of its study of the legal question submitted to it the Court addressed itself to the law applicable to it and examined Article 17 of the Charter as a whole, supplementing its study by the application of which this provision has been the subject. The Court has not confined itself to a reading of and commentary on the paragraph 2 of Article 17 referred to in the request for opinion. The Court has thereby provided the best demonstration of the fact that the mere reference to paragraph 2 of Article 17 in the request did not correspond to the requirement of paragraph 2 of Article 65 of the Statute of the Court which is that there should be "an exact statement of the question upon which an opinion is required".

It may even be added that the reference to paragraph 2 of Article 17 of the Charter in the request for opinion appears to have been deliberately imprecise. No explanation is given as to what must be understood by "expenses of the Organization". It would seem that reference is made to such expenses only to introduce a reference to the manner in which these expenses are to be treated, the manner in which they are to be apportioned and borne. That does not, however, come within the subject of the present request for opinion.

Consequently, and counter to the wording of the request in its reference to Article 17, paragraph 2, the Court, without having been invited to do so by the terms of the request, has carefully given room to Article 17 as a whole, and especially to its first paragraph. In it the Court has found the source of the General Assembly's budgetary power, its power to consider and approve expenses, and finally the Court has had reference to it to determine what must be

understood by "expenses of the Organization". The interpretation of Article 17 as a whole, supported by the practice to which the Court has given attention, has acquired in the reasoning of the Opinion a place which was not to be foreseen from the terms of the request.

To note this is to note that the request was not stated in the terms required by Article 65, paragraph 2, of the Statute.

The Court has adopted an interpretation of the request for opinion which it was not by the terms of that request bound to do. Starting from this interpretation and on the basis of considerations on the cogency of which it would not be fitting for me to express a judgment, the Court, seeking guidance from the Charter, its main provisions, its spirit, the purposes of the United Nations and the practice of the United Nations, has concentrated mainly on the budgetary competence conferred on the General Assembly. This has led the Court to declare that the expenditures submitted to it were "authorized by the General Assembly" in a manner in conformity with the Charter. If, following the example of the request for opinion, it is desired to state that these expenditures "constitute expenses of the Organization" and even to add "within the meaning of Article 17, paragraph 2, of the Charter", that is only a form of words.

I consider that on the basis of the considerations adduced by the Court in the reasons for its Opinion, it would have been preferable for the wording of the operative provision of the Opinion not to be taken from the terminology used in the request. The reference in the request to "expenses of the Organization" with the further detail "within the meaning of Article 17, paragraph 2" seems to have in mind the apportionment of those expenses by the General Assembly and the burden thereof falling on the States Members. These two questions, however, do not come within the request submitted to the Court.

There is still another point which seems to me to be deserving of attention.

By its terms the request for opinion is concerned only with the authorized expenditures which are referred to in it and which have been authorized up to 31 December 1961. For what may be termed a transitional period, expenditures have been authorized by the General Assembly up to 30 June 1962. After that date no provision has been made.

Thus the Court is invited to give the support of its legal opinion only in respect of the view which may be formed after the event of what has been done in the past. The Court has not, on the other hand, been invited to give guidance to the other principal organs of the United Nations on what should be done in respect of their undertakings in the Congo and in the matter of the Emergency Force. Where it would have been possible to obtain from an opi-

nion requested of the Court collaboration in the present work of the United Nations, it has been sought to obtain from the Court only a retrospective evaluation of what was done up to the end of 1961.

The request for opinion did not contain that exact statement which should have led the Court to reply to it and thereby to give to the other higher organs of the United Nations the collaboration due to them from it.

I should be departing from my proper role if, by reference to the preamble of General Assembly resolution 1731 (XVI) of 20 December 1961, I sought to divine what might have been done to secure that collaboration between the principal organs of the United Nations.

I regret to have to express my conviction that the request for opinion has not been presented in a proper fashion. It is for this reason that I consider myself unable to concur in the Opinion by which the Court replies to the request submitted to it.

(Signed) BASDEVANT.