INDIVIDUAL OPINION BY M. AZEVEDO.

[*Translation.*]

1.—I agree with the findings of the Court, and the purpose of the following remarks is merely to explain certain reasons which I should like to add to the opinion.

I would begin by referring to my previous view, that I am convinced that a radical change was made by the Charter in the matter of advisory opinions. I also have in mind the revision of Article 82 and the abolition of Article 83 of the Rules of Court, to prevent any request disguised as an opinion.

If the function of advisor given to a Court of Justice offends certain deep-rooted convictions, there is something even stranger in my view ; it is the *tertium genus* which has always impeded the clear application of the rule laid down in Article 14 of the 1919 Covenant, as may be seen by reading the commentaries of those who studied the problem (Bassett Moore, Hudson, De Visscher, Negulesco, Ténékidès, Dauvergne, Beuve-Méry, Remlinger, etc.).

The expressions "any dispute or any point" have given rise to the anomaly of settling a dispute without having the authority of a judgment and sometimes without the consent of the interested parties ; in this way, the principle of voluntary jurisdiction, which was at the basis of the system, ran the risk of disappearing as the result of a diversion which was easy to undertake.

In order to forestall such consequences, the Charter substituted for these expressions simply the terms "any legal question" (in English no change was necessary, because the word *question* already corresponded with the French *point*).

In my view, this strange notion which has been called "advisory arbitration" has now disappeared, as well as the participation of judges *ad hoc* in advisory opinions. The disturbing element having been removed, the advisory function of the Court will assume great importance, and the Court will not have to settle genuine disputes by a strange and indirect method, a sort of travesty of contentious procedure.

Grant Gilmore, in emphasizing the reduction of jurisdiction brought about by the Charter, has observed that the contentious cases decided by the old Court, being more or less linked to the consent of the parties, generally had only secondary importance, while those matters which were decided by advisory opinion were

much more interesting. (*Yale Law Journal*, August 1946. *The International Court of Justice*, pp. 1053, 1054 and 1064.)

That a Court should be asked for an opinion on theoretical questions may seem strange. But it must not be forgotten that the International Court of Justice has a double character : that of tribunal, and that of counsellor. And it is quite fitting for an advisory body to give an answer *in abstracto* which may eventually be applied to several *de facto* situations : *minima circumstantia facti magnam diversitatem juris.*

It is true that Manley Hudson made the point that the Permanent Court never deviated from the facts (*The Permanent Court of International Justice*, 1933, para. 470, pp. 495-496, and note 69), but he admits too that in Advisory Opinion No. 1 the question had already been decided by the International Labour Office, and that the request for the opinion had as its sole purpose the establishment of a criterion for the future (Hudson, *op. cit.*, p. 497, P.C.I.J., Series B., No. 1, p. 14).

Any request—apart from a quite artificial attitude, which cannot be presumed—always arises from or is influenced by facts, but it is also possible to eliminate the concrete elements, so as to reveal an isolated point of doctrine.

In the original report by Lapradelle, in 1920, an abstract request was already contemplated in connexion with the distinction between a "point", on the one hand, which was always limited to a question of pure, theoretical law, and, on the other hand, a "dispute", which had arisen from a concrete disagreement, already in existence.

Such a distinction therefore corresponds to the idea held by the founders of the Court, and it was clearly indicated in the plan proposed in 1920 by the Brazilian jurist Clovis Bevilacqua. It is for all these reasons that the Permanent Court could say :

> "There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty ; rather would it appear that this is one of the most important functions which it can fulfil." (P.C.I.J., Series A., No. 7, pp. 18-19 ; Series B., No. 1, p. 24.)

It is even preferable that the Court should ignore disputes that have given rise to any particular question. The Court would not then be led to incur responsibility by departing from its normal duty ; the Court would thus leave a wider field of appreciation open to the body which would have to apply the convention without slighting the prestige of the tribunal.

2.—I am glad to note that the first opinion for which the Court is asked affords a perfect example of the manner in which I would

wish questions always to be put. The Court has not even had above all to "consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States", as required by Article 82 of the Rules.

It is true that one of the recitals at the head of the resolution adopted by the General Assembly refers in precise terms to what happened in certain meetings of the Security Council, but if the questions asked are clear enough to make a complete answer possible, the Court is not bound by mere recitals.

On the other hand, if the Court chose to know the facts, it would not be limited, and would be free to inform itself not partially, but completely. That is why the Secretary-General did not send to the Court only the minutes of the three meetings referred to, but sent copious documentation, which the Assistant Secretary-General in charge of the Legal Department used in his oral statement.

Thus, the examination of these documents, as of all other elements which we have been able to examine for the purpose of investigation, convinces us even further that we should make a purely theoretical study of the question, so as to enable the Court without the assistance of any individual or State, to give an opinion of which the effects would be applicable to all Members of the Organization.

In fact, it can be seen, by examining the whole history of the Security Council and of the General Assembly, since the United Nations was founded two years ago, that almost the same arguments have been used and the same criticism reproduced alternatively by the representatives of certain States who found themselves, by the force of circumstances, in similar, though opposite, situations.

The discussion which began in the Security Council at the end of August 1946 might even be compared to that which had already taken place in the same body in January 1946; this made it possible for John Hazard to write about the idea of bargaining in the admission of Members even before the question really came up in the United Nations. (*Yale Law Journal, cit.*, p. 1031.)

3.—By applying an objective criterion faithfully, any legal question can be examined without considering the political elements which may, in some proportion, be involved.

Objection to the political aspect of a case is familiar to domestic tribunals in cases arising from the discretionary action of governments, but the Courts always have a sure means of rejecting the *non liquet* and of acting in the penumbra which separates the legal and the political, in the endeavour to protect individual rights.

In my country, an eminent jurist who was also a member of this Court, Ruy Barbosa, examined the problem fully in the light of comparative law (*Direito do Amazonas ao Acre*, Rio de Janeiro, 1910); it is particularly interesting to see in his work how, for instance, the history of the Washington Court from the beginning of the country's autonomous existence, through the war of Secession, until 1937, and the adoption of the *New Deal* by Franklin Roosevelt, affords useful information.

The decisions known as the "Insular Cases" have been ably commented on. C. F. Randolph, for instance, states that "these may be momentous political questions without the precincts of the Court; within, they are simple judicial questions" (*The Law and Polices of Annexation*, p. 105.)

But the possibility of a separation of the two aspects is still admitted in other countries, whose juridical systems are quite different from those of America. In this connexion, the activity of the French Council of State might be mentioned; its jurisprudence embraces a constantly widening field.

If we move into the field of international law, we observe that, outside the general wishes expressed in the Preamble, the Charter of the United Nations reminds us that the adjustment or settlement of international disputes or situations which might lead to a breach of the peace is to be brought about by peaceful means, and in conformity with the principles of justice and international law (Article 1, para. 1).

The good faith in which the obligations assumed in accordance with the Charter shall be fulfilled is also mentioned (Article 2, para. 2), as well as the duty of the Security Council to act in accordance with the purposes and principles of the United Nations (Article 24, para. 2).

Consequently, it cannot be denied that the United Nations rests essentially on legal foundations; the sovereign equality of States is restricted, in order to promote harmony among peoples (P.C.I.J., Series B., No. 13, p. 22), and it must be admitted that all nations, large or small, have had to limit their international activities.

The most typically political acts, such as the declaration of war, are subject to ingeniously linked "abortive" measures; on the other hand, the power to conclude treaties is regulated (Article 103).

In such conditions, the discretionary powers which are expressly granted, or which can filter through numerous flexible provisions, always come up against limitations and must, in addition, be exercised with a view to the aims of this legal order.

This is why the legal examination of questions can be extended to the frontiers of political action, although (as certain great minds would wish) the abolition of *non-justiciable* disputes has not yet been attained.

In the present case, the legal question is clearly apparent, and the Court can decide it without enquiring whether hidden political motives have been introduced or not, in the same way as the old Court has done in the Opinion No. 23 :

> "The Court .... is called upon to perform a judicial function, and .... there appears to be no room for the discussion and application of political principles or social theories...." (Series B., No. 13, p. 23.)

4.—Passing to the examination of the particular case, and dismissing the notion of the universality of the United Nations, an ideal which has not yet become a guiding rule for the admission of new Members, the following question must first be considered : whether there exists, or not, a subjective right to be admitted to this international society.

In favour of an affirmative answer, it has been suggested that the notion of an obligation in favour of third parties should be applied by analogy ; such a notion has been adopted in several treaties, and also by various international groups, such as the Industrial Property Group, to which each country is free to adhere, such adherence being sufficient for the country to begin to enjoy its rights and assume its obligations.

But here the act involved is not unilateral, but manifestly bilateral ; and it is complete only when the request for admission has been accepted by the principal organs of the United Nations.

Such a request is binding only on the applicant, and even if it is founded on the existence of the qualifications required by the Charter, the candidate cannot himself judge whether the conditions are fulfilled in conformity with Article 4. This is the task of the Organization, which may, or may not, accept the proposal by a judgment which it alone can render.

Therefore it is not a question of right, but simply of interest, which may, however, be transformed later by the judgment in question.

The conditions for admission, as deliberately laid down, are so broad and flexible that the recommendations and decisions relating thereto necessarily contain a strong arbitrary element.

It would be difficult to say that any one of the required conditions has a purely objective character, and that it could be appraised algebraically ; and despite the place allotted to the word "judgment", it is precisely in the matter of the peace-loving nature of

a State that a wide scope has been given to the political views of those who are called upon to pronounce themselves.

Motives of all kinds, tending to unite or separate men and countries, will slip through the remaining loopholes ; all kinds of prejudices, and even physical repugnance will find a way of influencing the decision, either by an act of the will or even through the action of the subconscious. Each appraisal will be psychologically determined according to the criterion applied by each voter.

It would be vain to require in practice that the representatives of States should act exclusively according to ideal and abstract considerations, seeing that at the basis of every social organization, there are only men, whose virtues and faults, individually or collectively, are almost the same.

The philosophical quarrel of the "universals" has not succeeded, through the centuries, in giving any other basis to human groups, in spite of the effect of nominalist, realist and conceptualist doctrines on legal personality, or on the institutional organism.

In short, all political considerations may intervene in determining the judgment of the organs of the United Nations regarding the qualifications laid down in Article 4 of the Charter. Hence, objections that have been raised regarding the protection of the rights of man, the attitude of countries during the last war, the extent of diplomatic relations, etc., may, in principle, justify the rejection of an application.

The idea arose in the San Francisco Conference itself, which approved, by acclamation, a proposal that countries whose governments had been established with the aid of the military force of countries that had fought against the United Nations, should be held not to fulfil the required conditions.

A direct reference to democratic institutions was avoided, roughly in the terms adopted at the Teheran Conference of 1943 (Goodrich and Hambro, *Charter of the United Nations*, p. 80), in order not to intervene in or even meddle with the domestic affairs of a country ; but the report itself, which expressed such fears, did not fail to stress that such an appraisal might be made when judgment as to the required qualifications was given. (U.N.C.I.O., Committee I/2, Doc. 1160, Vol. VII, p. 316.)

5.—On the other hand, it must be admitted that the examination of candidatures has been limited by determining all the requirements that a candidate was obliged to fulfil ; this was the *minimum* considered necessary to prevent arbitrary acts.

Consequently, the draft adopted differs essentially from that of the League of Nations, wherein no qualifications were required,

nor was previous enquiry made into the candidate's past. The candidate was merely invited to enter into an engagement for the future by giving ("provided that") effective guarantees of its sincere intention to observe its international obligations. A more restrictive and less discretionary régime was better suited to the rule of law which the world was desirous of re-establishing after the Moscow declaration of the Four Powers in 1943, and after the Atlantic Charter.

If we look at their method of construction, we shall find that the builders of the San Francisco Charter, in order to avoid increasing the number of articles, decided to provide for express faculties in certain cases ; thus, exceptions were made in regard to the important questions subject to a two-thirds majority (Charter, Article 18, para. 3), to territories to be brought under the trusteeship system (Article 77, para. 2), to non-member States which may become parties to the Statute (Article 93, para. 2), and to decisions *ex æquo et bono* (Statute, Article 38, para. 2).

But Article 4 forms no exception to conditions definitely laid down ; as regards the absence of the word "condition" in the English text, this does not change the system, if it be remembered that, on several occasions, the same word, taken in the same sense, corresponds in English sometimes to *condition* (Charter, Article 93, and Statute, Article 4, paras. 2 and 3, and Articles 18 and 35), and sometimes to *qualification* (Statute, Articles 2 and 9).

The examination of all the documents leads to the conclusion that exhaustive interpretation has been current in the practice of the organs of the United Nations, the Members of which have reciprocally made complaints on the subject of requirements lying outside the scope fixed by Article 4. It has never been asserted that a country fulfilling all the legal conditions might nevertheless not be admitted, because other conditions were not fulfilled ; on the other hand, it has always been stated that the absence of such qualifications prevented the fulfilment of the conditions prescribed by a provision that it was desired not to infringe.

And if I were not faced with an abstract question, and, consequently, if I had to take facts into account, I should consider that allegations which might be the basis of the first question asked have not been proved.

6.—Having established that the required conditions are fixed, it might still be possible—having regard to the doctrine of the relativity of rights already accepted in international law (P.C.I.J., Series A., No. 7, p. 30 ; and No. 24, p. 2 ; Series A./B., No. 46, p. 167)—to admit a kind of censorship for all cases in which there has been a misuse or, at any rate, abnormal use of power in the

appreciation of the exhaustive list of qualities—even granting a wide scope to political considerations.

Any legal system involves limitations and is founded on definite rules which are always ready to reappear as the constant element of the construction, whenever the field of action of discretionary principles, adopted in exceptional circumstances, is overstepped.

This is a long-established principle, and has served, during centuries, to limit the scope of the principle *qui suo jure utitur neminem laedit.*

The concept of the misuse of rights has now been freed from the classical notions of *dolus* and *culpa;* in the last stage of the problem an enquiry into intention may be discarded, and attention may be given solely to the objective aspect; i.e., it may be presumed that the right in question must be exercised in accordance with standards of what is normal, having in view the social purpose of the law. (*Cf.* Swiss Civil Code, Art. 2; Soviet, Art. 1; and Brazilian, Art. 160.)

There are even restrictions on arbitrary decision. It would, no doubt, be difficult to fix limits *a priori*, though examples might easily be given; e.g., could Switzerland be regarded as a non-peace-loving country? Could policy override the law to such an extent?

In another field, it might also be asked how the United Nations could continue to function if the reservation in the Charter regarding domestic jurisdiction was subject to no control.

But here there would be no need to seek for reasons; for the Court has before it a theoretical opinion. In any case, it would be a very difficult task to perform, because the Members voting are not bound to state their reasons.

Of course, if they choose to express their motives, they themselves would open the way to the examination of the restrictions, by transforming an abstract act into a causal act (as sometimes happens in private law in the case of certain forms of bonds), in such a way that an enquiry would be possible into the existence and authenticity of a particular cause. The *falsa demonstratio* may thus vitiate the act when it is subordinated to a certain motive.

It is true that it has been maintained that the statement of reasons is not merely an act of courtesy, but the fulfilment of a duty which enables the Assembly to know the reasons for a refusal. But if the great majority of the Members of the United Nations hold that the Security Council's recommendation is a condition *sine qua non* for the admission of a Member by the Assembly, it would be useless for the latter to verify the reasons

that the Council might have had for not reporting favourably on the application.

7.—The request for an opinion is not confined to a general point. It also contains a particular question, namely, the hypothetical case in which an affirmative vote is made subject to simultaneous admission of other States. Such an attitude has been alleged directly or indirectly, clearly or in a disguised manner, on several occasions.

But there is no question of a simple example or corollary, which would make a special reply superfluous ; on the contrary, the second question is, from its nature, not wholly included in the first. There is a change of plane from the individual to the collective, and this is not legally justified, if arbitrary action is excluded ; there is a change from the consideration of the qualities inherent in a certain candidate, to circumstances foreign to that candidate and concerned with the interests of third parties.

Once it is admitted that a State has proved that it has all the required qualifications, a refusal to accept its application might be considered tantamount to a violation, not only of an interest, but of a right already established, the acceptance of the State having been recognized, by final judgment, to be fully justified.

The most weighty reasons, such as the validity of a prior international undertaking, even if that undertaking bound all the Members of the United Nations, could not, in any case, justify the abandonment of a rule of law as an act of retortion. It would, in law, be equally abnormal to refuse admission in order to avoid acting unjustly towards a third party, or to defend oneself against action considered to be arbitrary, as it would be to demand compensatory advantages from a candidate.

8.—Having completely covered the question in its true limits, a judge will have fulfilled his duty if he gives a legal answer as to the law, independent of facts and without commenting on the attitude of any particular State (P.C.I.J., Series B., No. 13, p. 24).

If he does so, he will not hinder the political activity of the organs that are responsible for the maintenance of peace ; for elements of expediency, manifest or hidden, can always be considered when reasonable use is made of the wide possibilities opened by Article 4 of the Charter. Respect for law must never constitute a reason for disturbing international harmony, nor cause an upheaval in the life of any society.

(*Signed*) PHILADELPHO AZEVEDO.