SEPARATE OPINION OF JUDGE KLAESTAD

In my view, the Court should not have given the requested Opinion for the following reasons :

I. This Request for an Advisory Opinion, which is presented under Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, relates to four judgments rendered by that Tribunal in contentious cases brought before the Tribunal against Unesco by four of its former officials. Unesco challenges the validity of the judgments, by means of a Request for an Advisory Opinion, on the alleged ground that the Tribunal lacked jurisdiction or has exceeded its jurisdiction.

The normal judicial method of challenging judgments rendered by the Administrative Tribunal in contentious cases between an international organization and individuals would be by means of a review in contentious procedure. As, however, Article 34 of the Statute of this Court allows neither international organizations nor individuals, but only States, to appear before the Court as parties to contentious cases, the possibility of such a review by this Court would be excluded. In such circumstances Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation is intended to provide another means of submitting to this Court the question of the validity of judgments rendered by that Administrative Tribunal, namely, by way of a Request for an Advisory Opinion on questions relating either to the jurisdiction of the Tribunal or to "a fundamental fault in the procedure followed".

The four cases to which the Questions put to the Court relate, and which by their very nature were contentious cases before the Administrative Tribunal, have thus, by the operation of Article XII of the Statute of that Tribunal, been transformed into cases of an advisory character before this Court, though with the modification of the usual advisory procedure that the opinion given by the Court by virtue of Article XII, paragraph 2, shall be binding. This transformation from a contentious procedure before the Administrative Tribunal into an advisory procedure before this Court entails procedural consequences of a serious nature.

It follows from the provisions of Article 66 of the Statute of the Court that only States and international organizations have access to the Court in advisory cases. Individuals have no right to participate in the proceedings before the Court. In accordance with that Article, the Court may receive written or oral statements only from States or international organizations. Individuals have

not been accorded any right to submit written statements to the Court or to appear or be represented at public sittings in order to submit oral statements relating to the Questions put to the Court for an Advisory Opinion. Though the four former officials of Unesco are directly interested in the matter now before the Court and will be directly affected by its Opinion, they have not, by the provisions of Article 66, been given an opportunity to defend their interests. Nevertheless, Article XII, paragraph 2, of the Statute of the Administrative Tribunal provides that the opinion given by the Court shall be binding.

With a view to providing a remedy for this obviously unacceptable situation, Unesco has suggested that the observations and information which the four former officials may wish to lay before the Court should be transmitted to the Organization which, without any check of their contents, thereafter will send these observations and this information to the Court within the fixed time-limits. This suggestion has been accepted and complied with by Counsel for the four former officials. An expedient of this kind does not, however, ensure the necessary equality of status, in fact and in law, between the Organization on the one side and the individuals concerned on the other, inasmuch as the individuals would have to be dependent on the Organization—their opponent in the disputes before the Administrative Tribunal —for the presentation of their views to the Court.

The question of oral hearings presents even more serious difficulties. As Article 66 of the Statute does not allow individuals to appear or be represented at oral hearings, the Court would, if it fixed such hearings, have to envisage the possibility of Unesco appearing at the hearings and defending its view in the absence of the four former officials or their representative who are not entitled to participate. In order to prevent such an eventuality and to ensure, as far as possible, the necessary equality between the Organization and the individuals concerned, the Court was compelled to dispense with oral hearings in the present advisory case, though Article 66 presumes that oral hearings may be fixed by the Court, and in spite of the fact that such hearings have hitherto been fixed in all advisory cases which have been considered by this Court, as being a normal and useful, if not an indispensable, part of its proceedings.

II. Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, under which the Request is presented, provides that in any case in which the Executive Board of an international organization, which has made the declaration specified in Article II, paragraph 5, challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision shall be

submitted by the Executive Board concerned, for an Advisory Opinion, to this Court. Though the decisions of the Administrative Tribunal are rendered in disputes between the international organization and individuals, only the organization is accorded the right to challenge the validity of the decisions in this manner. The other parties to the disputes, the individuals, have no corresponding right to challenge the validity of the decisions. The reason for this manifest inequality may partly be due to the Statute of this Court, which does not entitle individuals to present a request for an Advisory Opinion.

The provisions of Article XII have thus established a manifest inequality between the parties to a dispute decided by the Administrative Tribunal. The Article has introduced a review procedure which fails to observe fundamental principles of equality of justice and impartiality of procedure. This lack of equality and impartiality is aggravated by the fact that the right to challenge the validity of a decision rendered by the Administrative Tribunal, while granted to the international organization, is denied to the weaker party.

III. In view of the abnormal judicial situation thus created by these various procedural rules, it may be asked whether the Court ought to answer the Questions put to it.

Article 65 of the Statute provides that the Court "*may give*" (in the French text : "*peut donner*") an advisory opinion on any legal question. Accordingly, in its Advisory Opinion of 1950 concerning the *Interpretation of certain Peace Treaties* (first phase), the Court stated :

> "Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request."

In the advisory case concerning the *Status of Eastern Carelia*, the Permanent Court of International Justice in 1923 actually declined to give an Opinion. The Permanent Court had previously, in March 1922, discussed the question whether it had the right to refuse to give a requested Advisory Opinion. Judge Moore had presented a memorandum in which he expressed the view that Article 14 of the Covenant of the League of Nations could not be regarded as imposing on the Court an obligation to render Advisory Opinions unconditionally and on request. The Court concurred in that view (Publications of the Court, Series D, No. 2, pages 161 and 383-398).

At that time the rule relating to advisory opinions was inserted in the Covenant of the League of Nations, Article 14. The English text provided : "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." In the French text it was said : "Elle [la Cour]

donnera aussi des avis consultatifs sur tout différend ou tout point, dont la saisira le Conseil ou l'Assemblée." The Statute of the International Court of Justice changed in Article 65 the word *"donnera"* to *"peut donner"*, thereby giving also in the French text a clear expression of the permissive character of the provision.

The Court is therefore, in my view, entitled to decline to give a requested Advisory Opinion when it finds that decisive reasons lead it to do so.

IV. Having regard to these various considerations, I am inclined to think that the Court should not, by answering the Questions put to it, implicitly give its sanction to a review procedure which places the parties to the disputes to which the Questions relate on a footing of manifest inequality, and which, contrary to the provisions of Article 66 of the Statute, creates an obstacle to the Court's consideration at oral hearings of requests for an Opinion. These considerations appear to be particularly relevant in the present advisory case in view of Article XII, paragraph 2, of the Statute of the Administrative Tribunal, which provides that the Opinion given by the Court shall be binding, thus assimilating the present advisory case more closely than usual to a contentious case.

To give an Advisory Opinion in the present case on the basis of this defective review procedure would hardly be compatible with the judicial duties of the Court. Being desirous to co-operate, as far as possible, with another organ of the United Nations in the discharge of international duties, the Court has departed from its usual procedure by dispensing with oral hearings and by receiving from the individuals concerned, who have no access to the Court, written statements transmitted to the Court by the Organization. Whatever may be thought of such a departure from a normal judicial procedure, the Court cannot in any case disregard or compromise with the fundamental principle of the equality of parties—equality in law as well as in fact—a principle which is expressly confirmed by Article 35, paragraph 2, of the Statute of the Court. Nor should the Court, by answering the Questions put to it, appear to acquiesce in a review procedure which fails to observe generally recognized principles by according only to one of the parties to the judgments of the Administrative Tribunal the right to challenge these judgments.

For these reasons, I consider that the Court should have availed itself of its right under Article 65 of the Statute to refrain from giving the requested Opinion.

On the other hand, I do not go so far as to say that the Court lacks jurisdiction to give an Advisory Opinion in the present case. Inasmuch as the Opinion, in accordance with Article 96 of the Charter of the United Nations and Article 65 of the Statute

of the Court, is requested by a duly authorized organ of the United Nations on legal questions arising within the scope of its activities, and since Questions I and III—but hardly Questions II *(a)* and *(b)*—fall within the terms and scope of Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, the jurisdiction of the Court to give an Opinion appears to be established. But in my view the Court should have refrained from exercising its jurisdiction, as it did, for different reasons, in the *Monetary Gold Case*. Since, however, the Court has decided otherwise, I have voted with regard to the Questions put to it, accepting the Answers given in the Operative Part of the Opinion.

(Signed) Helge KLAESTAD.