SEPARATE OPINION BY JUDGE AZEVEDO

[*Translation*]

1. Being unable to reconcile in my mind the notions which, though of a differing character, have been decided by one and the same vote, namely the preliminary point regarding the Court's capacity to comply with the Request for an Opinion and the answer which the Court should give to the questions put to it, I have found some difficulty in expressing my view. True, I would have preferred that the Court should have abstained from answering the question; as however that preliminary proposition did not find acceptance, I feel none the less obliged to state my opinion on the subject of the aforesaid questions, and I find no difficulty in giving it entirely in the same sense as the Opinion of the Court.

I cannot, however, refrain from explaining the reasons which, in my view, should have led the Court to abstain from answering the Request, seeing that the latter relates to a definite and clearly specified situation. In the Advisory Opinion concerning the Admission of new Members, I had already expressed, in my separate Opinion, my view that the subject of an advisory opinion should always be stated in an abstract form (C.I.J. *Reports 1947-1948*, pp. 73-75). But the prominence which the problem has assumed in the present case obliges me to explain my position in fuller detail.

2. In the days of the League of Nations, there was a tendency, which was accentuated by practice, to assimilate the advisory function of the Permanent Court with its function in contentious cases.

In spite of this tendency, it came to be recognized that there was a profound difference between opinions directed to a simple "point" or a "question" and opinions relating to an already existing "dispute"; in the former type of case, the Court was only concerned with a purely legal aspect of some question on which mere "*informateurs*", whose rôle was strictly limited, gave some preliminary explanations, whereas in the latter instance the Court was dealing with a genuine dispute.

Although, from a formal standpoint, the nature of all advisory opinions is the same—a simple relation between the Court and the requesting organization—an opinion delivered in respect of a "point" is, from a juridical standpoint, different from an opinion delivered in regard to a "dispute". That situation was noted by *Negulesco* ("L'évolution de la procédure des avis consultatifs", in *Recueil des Cours*, V. 57, p. 9).

Hammarskjöld also wrote :

> "It follows, without any possible doubt, that it would be contrary to the intention of the authors of the Covenant to regard the clause in question as a means of introducing into the Covenant, by a circuitous route, the idea of compulsory jurisdiction which had been deliberately excluded from it. But it is also clear that, in the view of the authors of the Covenant, the advisory function of the Court should be one whose exercise should be surrounded by all the necessary judicial safeguards." (*Juridiction internationale—"In memoriam"*, 1938, p. 284.)

In order to make that position secure, the Permanent Court had to claim the power of spontaneously examining its jurisdiction, by giving a general application to Article 36, paragraph 6, of the Statute, and also of examining the receivability of the request. As a result, the States concerned obtained the standing of parties, with an increased freedom of action.

3. The problem of the consent of the parties arose in regard to advisory opinions relating to a "dispute" which was already in existence.

True, it was generally recognized that an ordinary advisory opinion did not produce the effects of the *res judicata ;* nevertheless, that fact is not sufficient to deprive an advisory opinion of all the moral consequences which are inherent in the dignity of the organ delivering the opinion, or even of its legal consequences.

It is necessary to point out, incidentally, that the phenomenon of the *res judicata* has not the same importance in international law as it has in municipal law, where the judgment is enforceable by the State. On the contrary, international judgments are usually declaratory, and it is only in recent times that the idea of indirect sanctions applied by a third organ has been entertained. There remains the negative aspect of the question, the rule which forbids the renewal of a request on the ground of *exceptio rei judicatæ*, though it has been rarely applied in the international sphere.

Hammarskjöld, after an exhaustive study of this aspect of the question, observed that the legal explanations, which it has been sought to elaborate, have in no way modified the reality of the facts, namely that there was a certain compelling force, distinct from the force of the *res judicata*, attaching to the opinions of the old Court (*op. cit.*, pp. 289-291).

In the report of a committee, composed of Judges *Loder*, *Moore* and *Anzilotti*, which accompanied the clause in the Rules of Court that now constitutes Article 83, we find a series of affirmations leading up to the following conclusions :

> "In reality, where there are in fact contending parties, the difference between contentious cases and advisory cases is only nominal.... So that the view that advisory opinions are not binding is more theoretical than real." (P.C.I.J., Series E, No. 4, 1927, p. 76, English text.)

4. The importance of affirming this postulate—the necessity of the consent of the parties—was so pressing that the Court looked for an opportunity of doing so. It found it in connexion with the case of Eastern Carelia, on July 23rd, 1923, being desirous, most probably, of preventing, once for all, the recurrence of requests of this kind, by which the Council might charge it, indirectly, with the settlement of disputes already pending.

The Court declared with incomparable justice :

> "Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding its activity as a Court."

And it made that statement after having declared that :

> "The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion." (P.C.I.J., Series B, No. 55, p. 28.)

It is true that mention was made in that Advisory Opinion of another compelling reason, namely the impossibility of investigating the facts owing to the definite refusal of one of the governments engaged in the dispute. That was a reason which might have made it unnecessary to give other grounds in justification of a refusal to answer. Yet that reason had to yield precedence to another which might quite well have been simply mentioned as *obiter dictum*. The Permanent Court thought it right to disregard all judicial conventions so as to give prominence to the reason which it regarded as essential.

5. It has also been contended that the Court departed from that radical position in its Advisory Opinion of November 21st, 1925, in the Mosul case ; the allegation is incorrect, for the rule requiring the consent of the parties is quite compatible with a certain degree of flexibility in the ascertainment of that fact, in virtue of the principle of the *forum prorogatum*.

In the case of Eastern Carelia, the Court had already indicated *a contrario sensu* that consent might be given at any time (P.C.I.J., Series B, No. 5, p. 28) ; in the Mosul case, Turkey, in spite of the objections she had signified to the Council, did not meet the Court with a refusal but, on the contrary, gave an unmistakable tacit assent.

It is evident by the wording of the telegram in which Turkey made her reservations that she in no way disputed the competence of the Court, as distinct from that of the Council ; she merely contended that, having stated her point of view, she did not find it necessary to present written or oral statements, which are merely documents of the procedure. (P.C.I.J., Series B, No. 12, p. 8.)

6. The time came when the desirability of obtaining the accession of the United States to the Statute of the Permanent Court was

recognized ; we all remember the essential reservation adopted by the American Senate on January 27th, 1926, as a condition for adherence to the Protocol of Signature of 1920 :

> "Nor shall it [the Court] without the consent of the United States entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

The feature that chiefly strikes one in the long and laborious negotiations which took place at that time is the exaltation of the Court's *decision on the point of principle* in the Eastern Carelia case ; that decision was even invested with a conventional character as a consequence of a unanimous vote by the Council and Assembly, for it was thought desirable to give it the hall-mark of immutability in order to forestall any change of jurisprudence, not only in regard to opinions touching disputes to which the United States might be a party, but in regard to all cases, including ordinary questions, in which that country claimed to have an interest.

7. It must now be considered whether the above-mentioned régime has been modified by the adoption of the Charter of San Francisco.

The proposals put forward at Dumbarton Oaks endowed the new Security Council with power to ask for opinions, no longer on "disputes", but only in regard to legal "questions" connected with other "disputes" (Chapter VIII, Section A, No. 6). Thus, they did not confuse the means and the end, the container and its content, the whole and the part.

Finally, preference was given to a general formula, that of the present Article 96 of the Charter, though care was taken not to reintroduce the cognate terms "points" and "disputes", which had evoked so many protests and created such difficulties. A mere comparison of the texts of the Covenant and the Charter suffice at once to reveal the restrictions which were placed on the Court's advisory function.

8. It is true that the Court, which has been raised to the status of a principal organ and thus more closely geared into the mechanism of the U.N.O., must do its utmost to co-operate with the other organs with a view to attaining the aims and principles that have been set forth.

But there are certain limits which a judicial court may not overstep, even in the exercise of an advisory function assigned to it as a subsidiary activity. For instance, the absence of consent without doubt constitutes a *non possumus* which the Court will be obliged to declare, if only as an exceptional step.

9. The recognition that there is no clause restricting the right or duty of giving advisory opinions is not sufficient ground for concluding that the consent of the States directly concerned is not required. That would be an over-simplified interpretation, though it might have been more easily relied upon in connexion with the former Article 14 of the Covenant, which explicitly referred to "disputes"; but in fact, it was the opposite solution which prevailed.

To-day, we are no longer concerned with "disputes". Beginning with the very first draft, we find no mention of anything but legal "questions". It has not even been found necessary to change the word "questions" in the English text, though in the French version the word "*questions*" has had to be substituted for "*points*"—an alteration without any significance.

Accordingly, the compelling reason which had led to the abolition of one of the clauses of the Covenant—i.e. the refusal to make use of the advisory function to decide a genuine dispute at law over the heads of the parties concerned—continues to retain its force, for it is the only means of avoiding a misuse of that function.

10. There are a number of circumstances which combine to forbid the abandonment of a conclusion so firmly established under the former régime.

To begin with, it must be recognized that neither the resolutions and appeals emanating from all parts of the world nor the efforts of learned jurists were successful in establishing this compulsory jurisdiction of the Court, in spite of the numerous proposals put forward at San Francisco.

The parliamentary debates occasioned in different countries by the ratification of the Charter confirm that conclusion. It may be pointed out, for example, that the conditions attached by the United States Senate to the acceptance of the so-called Optional Clause do not deviate in substance from the Senate's attitude in 1926; they are evidence of a continuing anxiety in regard to possible excesses in this sphere.

It is also appropriate to cite a precedent of our own Court. It concerned a recommendation by the Security Council, a body which is equipped with powerful means of enforcement and appointed as mandatory of all the Member States in matters relating to security and world peace. Although the majority of the Court saw no reason for discussing the value of this recommendation, for they considered that the party before them had given its consent, seven of the judges found it necessary, in a joint Opinion, to express their definite opposition to a doctrine maintained before the Court by one of the parties. They did so in the following terms:

> "it appears impossible for us to accept an interpretation according to which this article [Art. 36, No. 3], without explicitly saying so, has introduced more or less surreptitiously a new case of compulsory jurisdiction" (I.C.J. *Reports 1947-1948*, p. 32).

11. The right of requesting opinions assumed a considerable extension in 1945, but that fact is merely additional evidence of the impossibility of admitting the existence of a substitute form of compulsory jurisdiction.

Without even requiring a unanimous vote, or even the existence of a proper *quorum*, the right to request opinions has been assigned to almost any organ of the U.N.O. and to the specialized agencies which may at any time be authorized by the General Assembly to make such a request (Art. 96, para. 2), whereas formerly an examination of the particular case was requisite before the Assembly could transmit the Request.

One can imagine the anarchy which would ensue if the Court had to examine "disputes" actually pending between States—whether Members or non-members of the U.N.O.—at the request of any or all of these organs or agencies without any assurances being required as to the previous consent of the States concerned ; to realize the possible effects of such a mischievous arrangement, it suffices to read the reports in the Yearbooks of the Court where it appears that nearly a score of institutions have been endowed with a full or limited right to ask the Court for advisory opinions on legal questions arising in their field of activity.

12. This is not the time to examine what should be our concept of sovereignty at the present day, but no doubt it is implied *de jure condito* in the indirect form of sovereign equality, and it is perhaps strengthened by the clause in the Charter concerning the exclusive competence of States, especially if we compare that clause with the one which formerly dealt with so-called domestic questions.

At any rate, it must be recognized that this well-known conception underlies the requirement of *inter volentes*, as a condition for any international activities in the arbitral or judicial spheres.

But sovereignty is so highly sensitive a conception that even a judgment of a moral sort, or a simple opinion, may offend it ; and it would be very unwise to leave that conception, without any protection, at the mercy of the caprice of a simple majority in any agency which might happen to be authorized to ask for an advisory opinion, in precisely the same terms, as are applicable to the General Assembly or the Security Council.

13. Accordingly, now that the obstacle represented by Article 14 has been eliminated, it is necessary, in order to avoid a recurrence of the dangers which had, as a fact, been removed by a judicious interpretation of that badly-drawn text, to guide the activities of the Court on to a neutral ground, where legal issues can be isolated from the facts, or at any rate from the more immediate circumstances to which they owe their origin.

It is always easier to work in the abstract, and any difficulties which we encounter in doing so will be amply recompensed by the

knowledge that sovereign States are thus being protected from needless annoyance.

In discussing the Opinion referred to above, I emphasized the obvious importance for the Court of isolating points of doctrine in order to remove "disputes", which might be pending, from its purview. On the one hand, the Court would be kept aloof from inflammable matters without straying from its proper field of activity, and, on the other hand, the organs which had requested it for opinions would find it easier to adopt whatever decisions were called for in a given case without fearing that the Court might feel slighted by such action (I.C.J. *Reports 1947-1948*, p. 74).

It was this consideration which inspired the Court in the wording of that Advisory Opinion, which was drawn up with remarkable skill so as to emphasize the abstract character of the questions put to the Court, although some of the *consideranda* in the preamble contained allusions to a specific situation (*vol. cit.*, p. 61), a circumstance which, on the other hand, gave scope for the elaboration of dissenting opinions (*vol. cit.*, pp. 94 and 107).

No doubt it is always possible to discern at the base of any abstract opinion a specific situation which is alluded to remotely or indirectly ; for, apart from any factitious attitude of mere curiosity, there is always a fact underlying any question. But it is necessary to refrain from too deep or too searching an effort for its discovery, not from a vain desire to create purely artificial situations, but to promote the usefulness of the advisory function by reducing the difficulties.

We should constantly bear in mind that the distinction between abstract and concrete questions, established in Lapradelle's report as early as 1920, remains immune from the confusion introduced by another discarded notion, that of the recognition of a dispute of earlier origin.

The Court must endeavour to adhere to the course that it has followed in its previous advisory opinions, that is, it should answer questions of a general character without respect of persons or of States.

14. In this connexion, I have observed that the Rules of the new Court, far from facilitating this sound practice, have taken a directly opposite course, and endeavour to maintain an obsolete system, represented by the dangerous distinction between a "question" and a "dispute" (*vol. cit.*, p. 73).

As it would have been inadmissible to retain the word "dispute" which had already disappeared, the Rules of Court have attached the word "existing" (now modified to read "actually pending") to the word "question", though that term was appropriate neither to "point" nor to "question", but only to "dispute".

In consequence, we have returned to the untenable hypothesis which had become a closed chapter ever since the case of Eastern

Carelia, I mean the hypothesis that an opinion may be delivered against the will of a party to a dispute that has been found to be pending.

The result, as it was easy to foresee, has been that it was found impossible ever to apply the text of the Rules which have retained the actual basis of this unfortunate distinction:

> "it [the Court] shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States" (Article 82, para. 1, *in fine*).

Several opinions have already been requested, but the Court has not yet enunciated any preliminary rule which would make it possible to decide, with complete impartiality, whether the States were appearing as parties or merely as ordinary "informers". In the present case for instance, some of the parties have asked to be considered simply as "*informateurs*", a claim which is inconsistent with the very nature of their positions in the case.

15. In regard to the appointment of a judge *ad hoc*, it may be mentioned that the Permanent Court finally accepted that arrangement, under the influence of the former Article 14. But, when that article had disappeared, it would have been logical also to abolish Article 83 of the Rules, for such a right is quite inconsistent with theoretical or abstract opinions—the only kind of opinions which the Court should now give upon legal "questions". Naturally, if a State agreed to have its "dispute" settled by a mere opinion, the advisory procedure would lose its true nature and would assume that of procedure by Special Agreement, thus rendering Article 31 of the Statute also applicable. In that way we should come back to the celebrated "advisory arbitration" which was introduced in the case of the Nationality Decrees in Tunis and Morocco (P.C.I.J., Series B, No. 4, p. 8).

The Rules of Court contain clauses which overstep the limits fixed by the Statute and which should be abolished in order to avoid confusion being caused, especially to the numerous organs which are entitled to request opinions. We should, on the contrary, offer guidance to these organs in the formulation of their requests which should, as far as possible, be silent regarding the facts, with a view to promoting the rapid and easy decision of cases in which there are legal points to be elucidated, in the first place.

16. In the present case, one is struck immediately by the extreme simplicity of the questions asked, at any rate of those with which the Court is now concerned; if one regarded them as abstract points, one would be amazed at their having been asked.

But the request is not content with indirectly transmitting a dispute between Member States and States which are not

members to the Court, against the will of some of the parties. It goes further and attempts to attribute material effects to the opinion.

17. Thus, the Assembly lays down that, if the Court replies in the affirmative to the first two Questions, a period of grace will automatically begin to run so as to allow the recalcitrant States to make good the time they had lost, as in a case of *emendatio moræ*.

The Court's opinion will thus possess an enforceability *sui generis* somewhat in the nature of an interdict or a writ. It is tantamount to a summons which is addressed to the above-mentioned States without even waiting till the requesting organ has received the Court's opinion and deliberated on it.

This Opinion will therefore produce more impressive effects than many judgments in contentious cases. There will be a sanction, resembling a daily fine, suspended over the heads of the States which are opposing the application of the Treaties. And, finally, the uselessness of this formal summons will be apparent if, for example, the Court replies in the negative to the other questions which constitute the last links in the chain.

There is no ground for differentiating between an opinion on a State's behaviour in the past and a ruling as to what it should be in the future. To give a ruling on the future behaviour of a State is not different from expressing an opinion on its conduct in the past. In any case, it would be an infringement of the independence of States to make use of the Court in order to give impressiveness to this minatory action.

Our recognition of the excellent intentions which no doubt inspired the General Assembly would not justify us in ignoring such obstacles.

18. It has been contended that in the present case there is no "dispute". But some States have maintained that the obligations assumed under a Treaty have been discharged, whereas other States have denied it, and each group of States is relying, against one another, on different clauses of the same Treaties. It is therefore unquestionable that there is a dispute requiring either settlement or an indication of the method of settlement, and that brings the matter into the sphere of contentious cases.

To affirm the existence of a dispute in the present case is to begin to adjudicate upon it, and therefore to recognize the competence of the Court.

It matters little that the question at issue is not the main dispute, for there are sure to be preliminary questions which will emerge clearly and which, as contentious matters, will be susceptible of separate adjudication.

19. The analogy with the case of Eastern Carelia is thus very striking, for there again the issue was not the merits of the dispute,

but a preliminary question which, while necessarily affecting the examination of the case and the final settlement, did not, strictly speaking, as was pointed out at the time, prejudge the substance of the dispute.

A similar situation was observed in the advisory case concerning the decrees promulgated in Tunis and Morocco ; in that case the preference expressed by the Court in connexion with a question—which, though preliminary, was of a pivotal character—did not prevent the subsequent direct settlement of the case.

In the present case, we have precisely the same situation ; for a decision as to the method to be adopted constitutes by itself a pivotal point, and will exercise considerable influence on the course to be followed in examining and settling the case, especially as regards the determination of the national or international character of the question concerning human rights.

20. I now come to my conclusion in regard to the obstacle with which the Court is confronted and which should lead it to conclude that it must abstain from giving an answer.

As was the case in 1923, the point which must primarily be borne in mind is that the Court cannot abandon the fundamental rules of international law in order to favour an indirect action designed to settle a dispute actually pending by way of a Request for an Advisory Opinion.

A large measure of flexibility is admissible in seeking the consent of the parties ; but this consent cannot be dispensed with altogether when the Court is confronted with a dispute actually pending. Similarly, one may acknowledge the duty of reasonable co-operation with the other organs of the United Nations and go so far as to give opinions which, though couched in abstract terms, may be seen on closer inspection to be more or less indirectly connected with specific disputes ; but that would not justify the delivery of opinions relating to disputes which are explicitly indicated or mentioned either in the text of the questions or in the preamble which usually precedes the questions.

To sum up, we must build a wall between the contentious and the advisory functions. The latter should preferably bear a resemblance to the impersonal action of a Public Prosecutor when he is acting solely in the interests of the law.

To abandon these elementary precautions would be to ignore the decisive refusal of the States to accept any rule of compulsory jurisdiction.

We must be content to wait until the Court is regularly entrusted with that duty which, no doubt, it will some day have to discharge. But our abstention in the present case would provide an additional means of convincing the Associated Powers of the need of the earliest possible attainment of so desirable a result.

(*Signed*) PHILADELPHO AZEVEDO.