SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I have voted in favour of the Advisory Opinion but consider it necessary to explain my position on four aspects. These relate to: (i) the priority basis of the request; (ii) Romania's reservation to the Convention on the Privileges and Immunities of the United Nations, 1946; (iii) Romania's case relating to Mr. Mazilu's state of health; and (iv) the applicability of the Convention to enable an expert to leave his State of nationality or residence in connection with his mission.

I. The Priority Basis of the Request

The first aspect concerns the Order of Court of 14 June 1989, as referred to in paragraph 3 of the Advisory Opinion. As appears from the Order, "in fixing time-limits for the proceedings" it was found "necessary to bear in mind that the request for opinion was expressed to be made 'on a priority basis'" (*I.C.J. Reports 1989*, p. 10). The dossier shows that the introduction of those last four quoted words in the formulation of the request was the subject of specific challenge in the proceedings of ECOSOC on the ground "that the Council was not empowered to give the Court guidelines with regard to priorities when it did not know what other questions the Court had before it . . ." (Dossier, doc. No. 98, p. 2, *per* Mr. Mikulka, Czechoslovakia, May 1989). I do not think that the challenge was well founded, but it does raise a point of sufficient importance to require me to say that, in my opinion, it is always for the Court, while giving due and proper weight to any representations by a requesting body, to decide in its own discretion whether the circumstances of any particular case justify a priority hearing. The question has been helpfully noticed by the commentators, but I would like to state an approach limited to the level of certain general principles.

As is suggested by the case of the *Trial of Pakistani Prisoners of War, Interim Protection* (*I.C.J. Reports 1973*, p. 330, paras. 10-14), the eligibility of a new case to be heard in priority to other pending cases presupposes urgency, and the Court remains competent to adjudicate on urgency even where a case formally falls within a category of priority prescribed by the Rules of Court. This, I apprehend, is because of the overriding judicial character of the Court as established by the Charter and the Statute, with

both of which the Rules of Court must of course conform in their provisions, as well as in their interpretation and operation.

As I read the *travaux préparatoires* relating to the establishment of the Permanent Court of International Justice, they show that, in contradistinction to the Permanent Court of Arbitration accommodated under the same roof, the former was intended to be a court of justice as normally understood. That key concept, though derived from municipal law, was intended to be generally controlling and, indeed, its primacy has been repeatedly affirmed both by that Court and by this. The chief characteristic of a court of justice is that it is invested with judicial power. In the normal case, some external agency possessed of appropriate legislative competence over the jurisdiction of a court, or, failing that (as in this case), the machinery competent to amend the constitution of the court, may well have authority to modify the extent of the court's original endowment of judicial power; but, however that may be, the court itself is powerless to alienate any part of its grant. Even when account is taken of the usual caution relating to the transposition of municipal law concepts to the plane of international law, it seems unpersuasive to appeal to the international status of an international court of justice to suggest that on so fundamental a matter such a court is exempt from the restraints applicable to courts of justice as generally understood.

A decision to hear a new case in priority to other pending cases has consequences both for the hearing of the new case and for that of the others, and hence for the good administration of justice. Such a decision pertains to, and forms part of, the Court's judicial power. Accordingly, the Court's rule-making competence would not embrace the transfer to a party or to an entity in an analogous position, of any part of the power of the Court to determine questions relating to priority (the right to submit any views being another matter). This would be so even in an advisory case, given the essential judicial character of the Court. True, in such cases "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 71); but, of course, it is as a court of justice that the Court participates. The Court no doubt has autonomy in the exercise of its rule-making competence; but, however extensive its autonomy, its competence is not unbounded. A clear and definite limit is discovered by the reflection that, however generously it may be construed, the Court's rule-making competence was intended to be used for the purpose of regulating the exercise of the Court's judicial power, not for the purpose of disposing of it. The Rules of Court are made, and are intended to be read, on the basis of this understanding. The Court remains free, therefore, to determine the need for priority in all cases.

II. The Romanian Reservation to the General Convention

Paragraphs 29 to 36 of the Advisory Opinion deal with Romania's contention that the absence of its consent bars recourse to the advisory jurisdiction of the Court under Article 96 of the Charter. As the Advisory Opinion suggests, Romania logically can only be taking that position if it is also taking the position that its reservation to Section 30 of the General Convention is applicable to the Charter so as to impose a requirement for consent as a pre-condition to recourse to that jurisdiction. I agree with the Court in not accepting this contention but would like to give my reasons.

Aside from the question whether the Charter admits of reservations and apart from the difficulty presented by the notion of a reservation being made to a treaty (in this case, the Charter) by a State after it has become a party to the treaty, it seems to me that the idea of a reservation to one treaty operating also as a reservation to another treaty is essentially not right. In the *Nuclear Tests (Australia* v. *France)* case (*I.C.J. Reports 1974*, p. 253) the Court had before it a contention that certain reservations contained in a declaration by France accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute applied also to its obligations under the General Act for the Pacific Settlement of International Disputes, 1928. Referring to this contention and to Article 2, paragraph 1 *(d)*, of the Vienna Convention on the Law of Treaties, 1969, the joint minority opinion (Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock) observed:

> "in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations." (*Ibid.*, p. 350.)

The correctness of this statement of principle is scarcely open to challenge.

The effect of the Romanian reservation is on Section 30 of the Convention alone. By contrast, competence to request an advisory opinion is regulated exclusively by Article 96 of the Charter. Section 30 of the Convention does not and cannot confer a competence on anyone to request an advisory opinion; the Section is hinged on any such competence conferred by or under Article 96 of the Charter. All that Section 30 of the Convention does is to make it compulsory for the body vested with appropriate competence by or under Article 96 of the Charter to exercise that competence in relation to certain differences, and incumbent on the

parties to such differences to accept the resulting advisory opinion as "decisive". The action of the reservation is exerted on these two additional features and not on the Court's jurisdiction under Article 96 of the Charter. If, because of the reservation, these two features fall away in the case of Romania, the jurisdiction under Article 96 of the Charter remains, as before, unaffected by the reservation. And this, it should be added, is putting at its highest Romania's view of the extent to which the reservation affects Section 30 of the Convention — a view that is open to dispute but which I agree with the Court it is not necessary to examine (see paragraph 34 of the Advisory Opinion).

In sum then, while agreeing with paragraph 36 of the Advisory Opinion that "the reservation made by Romania to Section 30 of the General Convention does not affect the Court's jurisdiction to entertain the present request", I would like to add that the reservation does not affect that jurisdiction because it simply cannot.

III. Romania's Case Relating to Mr. Mazilu's State of Health

On the question of Mr. Mazilu's state of health, I agree with the finding made in paragraph 59 of the Advisory Opinion to the effect "that it was for the United Nations to decide whether in the circumstances it wished to retain Mr. Mazilu as special rapporteur . . ."; but, apart from the circumstance that that proposition is so self-evident that I hesitate to interpret the material as credibly evidencing an intention by Romania to dispute it, it appears to me that the Romanian argument on this branch of the case does not necessarily depend on who has the right to retain Mr. Mazilu as special rapporteur or to terminate his appointment on grounds of illness (governmental appointments being another matter). What Romania seems to be saying in its written statement to the Court, as I understand it, is something different which may be expressed this way:

(i) even assuming that Mr. Mazilu was and continues to be an expert on mission (as is found by the Court, with which I agree), illness so wholly incapacitated him from carrying out his functions as to preclude him from having any need for, and therefore any entitlement to, the privileges and immunities provided for by the Convention, these being functionally based; and

(ii) Romania has exclusive domestic jurisdiction over the health of its nationals, with the consequence that, Romania having made its own determination of Mr. Mazilu's state of health, that determination is

final for all purposes, and any attempt by the United Nations to verify it within Romania or to act contrary to it would be an interference in Romania's internal affairs (paras. 19 and 26 of the Advisory Opinion; Dossier, doc. No. 61, para. 53, and doc. No. 64, para. 42; Romania's written statement to the Court, pp. 7-8; United States written statement to the Court, p. 10; and the Secretary-General's written statement to the Court, paras. 17, 19 and 67).

If indeed this is the Romanian argument, it would not appear to be free from difficulty. Mr. Mazilu's status as a special rapporteur is based on a relationship subsisting exclusively as between himself and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. A decision as to whether a special rapporteur is in such a state of health as to be incapable of functioning is one to be made by the Sub-Commission as the employer. As a stranger in law to the relationship between the Sub-Commission and Mr. Mazilu, Romania had no juridical basis for intervening to impose its own opinion on the point. No doubt States ordinarily have exclusive domestic jurisdiction over questions concerning the health of their nationals and can and do intervene on such questions as between employer and employee. But the settled jurisprudence of the Court makes it clear that a matter which would normally be within a State's domestic jurisdiction ceases to be exclusively so to the extent to which it has come to be also governed by any international obligations undertaken by the State (see the *Nationality Decrees Issued in Tunis and Morocco* case, *P.C.I.J., Series B, No. 4*, pp. 21-24; the *Acquisition of Polish Nationality* case, *P.C.I.J., Series B, No. 7*, p. 16; the *Certain Norwegian Loans* case, *I.C.J. Reports 1957*, pp. 37-38, *per* Judge Lauterpacht; and the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1978*, pp. 24-25).

In my view, in agreeing to accord privileges and immunities to their nationals for the purpose of enabling them to carry out their functions when appointed as experts on missions, alternatively, by reason of their being parties to the Charter and committed to promoting its objectives, Member States by necessary implication conceded to the United Nations a right in good faith (not questioned in this case) to determine the capacity of such nationals, on grounds of ill health or otherwise, to continue to carry out their functions. If the Romanian position is correct, the United Nations would be wholly excluded from exercising that right once the view was expressed by the State of nationality that an expert was too ill to perform. It is not necessary, in my view, to consider what settlement procedures might be available if a dispute were to arise as to whether the United Nations was acting in good faith.

IV. Applicability of the General Convention to Enable an Expert to Leave His State of Nationality or Residence in Connection with His Mission

The circumstance that the Court's Advisory Opinion specifies some of the more important privileges and immunities available to experts on missions, and therefore to Mr. Mazilu as such an expert, does not perhaps mesh entirely with the view presented by the Secretary-General to the effect that "the Court ... has not been asked ... about what privileges and immunities Mr. Mazilu might enjoy as a result of his status ..." (Advisory Opinion, para. 27). If the Court has in fact acted on a less sparing conception of the scope of the request, this is because, as it appears to me, the view referred to is admissible not by way of modification of the scope of the request, but only by way of interpretation, as it was of course intended; and possible interpretations advanced before the Court do not restrict the range of choice open to it as to the meaning of the governing text of the resolution presenting the request (see the analogous approach taken in the *Factory at Chorzów* case, *P.C.I.J., Series A, No. 13*, pp. 15-16; the *Free Zones of Upper Savoy and the District of Gex* case, *P.C.I.J., Series A, No. 22*, p. 15, and *P.C.I.J., Series A/B, No. 46*, p. 138; the *South West Africa* case, *I.C.J. Reports 1966*, p. 354, *per* Judge Jessup, dissenting; and *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 223).

In settling what interpretation is to be placed on the question before the Court, it would seem best to approach the question "in the light of the actual framework of fact and law in which it falls for consideration" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 76). That framework may be gathered from the terms of the request viewed against the background material submitted by the Secretary-General in relation to the Sub-Commission's own resolution to which the request expressly refers (see the approach taken by Judge Lauterpacht in the *South West Africa* case, *I.C.J. Reports 1956*, p. 36). Interpreted this way, it is reasonably clear that the request is intended to invite an answer not only as to whether Article VI, Section 22, of the General Convention is applicable in principle "in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission", but also, if it is applicable, as to the way in which it is applicable in the particular circumstances of that particular case. When the context and structure of the request are considered, technical distinctions between the concepts of "applicability" and "application" do not have the effect of excluding these aspects, provided that the answer does not trench on any question as to whether any particular privilege or immunity was violated.

In my view, therefore, the Advisory Opinion has correctly gone on to identify particular privileges and immunities available to experts on

missions, and hence to Mr. Mazilu as such an expert. But there is one particular right, namely, that relating to travel, which, I believe, merits closer attention. This aspect is linked to paragraph 55 of the Advisory Opinion which states that rapporteurs or special rapporteurs

> "enjoy, in accordance with Section 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports . . .".

I understand this as conveying, among other things, that experts on missions, whether or not assigned to any particular place, are entitled to invoke the privileges and immunities conferred by the Convention to enable them to leave their State of nationality or residence in connection with the performance of their missions. With this view I agree, but I should like to give my reasons for supporting it with a degree of specificity commensurate with the special, if not primary, interest which it manifestly has for the requesting organ, as may be gathered from the several references to it, on one aspect or another, in the Advisory Opinion itself (see paras. 11, 13, 14, 16, 17, 18, 21, 22, 24, 26, 49 and 52).

My reasons may be conveniently set out in relation to the Romanian contention by which the issue was presented. Treating Mr. Mazilu as an expert present in his own State but assigned to function elsewhere (a position which I will assume for the sake of analysis), Romania submitted that —

> "Section 22 of the Convention provides that 'experts . . . performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions'. Those provisions make it clearly apparent that an expert is not accorded such privileges and immunities anywhere and everywhere, but only in the country to which he is sent on mission and during the time spent on the mission, and also in the countries to which he must transit when travelling to meet the requirements of the mission. In the same way, the privileges and immunities only come into existence from the expert's time of departure, when he travels to accomplish the mission. In so far as the expert's journey to carry out the mission for the United Nations has not begun, for reasons entirely unconnected with his activity as an expert, there is no legal basis upon which to lay claim to privileges and immunities under the Convention, regardless of whether he is in his country of residence or in another country, in a capacity other than that of an expert.
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> In the country of which he is a citizen, in the country where he has his permanent residence, or in other countries where he may be for reasons unconnected with the mission in question, the expert is only

> accorded privileges and immunities in relation to the content of the activity in which he engages during his mission (including his spoken and written communications)." (Romania's written statement to the Court, p. 6. And see Advisory Opinion, para. 24.)

I accept as accurate Romania's statement "that an expert is not accorded such privileges and immunities anywhere and everywhere": their functional character clearly excludes so wholesale and undiscriminating an application. Where I have difficulty is in so far as it would seem to follow from Romania's position that an expert present in a Member State who, for reasons entirely unconnected with his activity as an expert, has not in fact begun his outward journey to carry out a mission falling to be discharged elsewhere but who wishes to embark on such a journey, cannot, as a matter of law, invoke those privileges and immunities to enable him to commence the journey. This is because, on Romania's argument, so long as he has not begun his journey, he is not entitled to any privileges and immunities apart from the limited and not relevant exception mentioned in its statement. So, the limited exception apart, not having begun the journey, the expert has no privileges and immunities, and, not having any privileges and immunities, he cannot enforce a right to begin the journey. Locked in within this system, the expert may well be unable to perform the mission which the privileges and immunities were intended to enable him to perform. Possibly, so strange a result could collide with the position taken by the Court as to the "duty [of a party to a treaty] not to deprive [it] of its object and purpose" (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 140, para. 280; cf. *ibid.*, p. 249, para. 79, *per* Judge Oda, dissenting). I propose, however, to approach the matter in the following way.

In conferring privileges and immunities on experts "during . . . the time spent on journeys in connection with their missions", Article VI, Section 22, of the Convention obviously regards the making of such a journey as an essential step in the discharge of an expert's mission, as, indeed, it plainly is. Equally obviously, an expert may need to commence such a journey from any Member State in which he happens to be, even if he is there for a purpose wholly unconnected with his mission. Accordingly, his entitlement under that provision to "such privileges and immunities as are necessary for the independent exercise of [his] functions during the period of" his mission would extend to enable him to embark on such a journey undertaken in connection with the discharge of those functions. The express reference to "privileges and immunities . . . during . . . the time spent on journeys in connection with" his mission cannot be read as meaning that privileges and immunities are available only if and when such a journey is in fact in progress but not also for the purpose of enforcing a right to commence the journey in the first place.

Under Article VII, Section 26, of the General Convention (referred to in paragraph 43 of the Advisory Opinion) an expert is entitled to travelling facilities (including the issue of any necessary visas) from a Member State to which or through which he intends to go in connection with his mission. In exercise of this entitlement, the expert may have applied to such a State for visas and other facilities and secured them only to discover that he cannot use them if he cannot rely on the privileges and immunities conferred by Article VI, Section 22, of the Convention to enable him to leave a Member State in which he happens to be present for a purpose unconnected with his mission.

However strict may be the construction to be placed on provisions providing for privileges and immunities (see Alain Plantey, *Droit et pratique de la Fonction publique internationale*, Paris, 1977, p. 409, para. 1298), results as surprising as those indicated above suggest that the privileges and immunities conferred on an expert by Article VI, Section 22, of the Convention must, subject to the limitations prescribed in that Article, be construed as extending to afford protection against all acts which could frustrate their operation or empty them of real content, with the consequence of effectively preventing the expert from embarking on or resuming his mission. The dangers which proverbially lurk in the use of maxims do not seem to forbid recourse in this case to the well-known words *quando lex aliquid alicui concedit concedere videtur et id sine quo res ipsa esse non potest* — when the law gives a man anything, it gives him that also without which the thing itself cannot exist.

Explaining the rarity of references in the judgments of the Court to arbitral decisions, Judge Charles De Visscher wrote:

> "The rarity of such references is a matter of prudence; the Court is careful not to introduce into its decisions elements whose heterogeneous character might escape its vigilance" (Charles De Visscher, *Theory and Reality in Public International Law*, rev. ed., 1968, p. 391).

Judge Jessup's interesting explanation was: "The Court, *qua* Court, naturally hesitates to cite individuals or national courts lest it appear to have some bias or predilection" (Judge Philip C. Jessup, letter dated 16 August 1979, *Annuaire de l'Institut de droit international*, 1985, Vol. 61, I, p. 253). No doubt these words of caution extend to other decisions as well. But, apart from the fact that there is some flexibility in the case of individual judges, I do believe that the judicial policy concerning such citations, wise as it is, is not of such rigidity as in practice to disable the Court from benefiting from other experience, particularly where specific guidance in its own jurisprudence is lacking, as seems to be the case here.

Without suggesting that it is wholly applicable, I turn accordingly to the general approach taken in the majority opinion of the European Court

of Human Rights in the *Golder* case (Judgment of 21 February 1975, Series A, Vol. 18) in which that Court had to construe Article 6, paragraph 1, of the European Convention on Human Rights, reading:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ."

Recognizing that this provision did not in terms confer a right of access to the courts, the European Court of Human Rights nevertheless affirmed the existence of such a right in these words:

> "While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded . . ." (*Ibid.*, p. 15, para. 32.)

In effect, if it was correct to say that Article 6, paragraph 1, of the European Convention excluded an antecedent right to institute proceedings in a court, it would follow that the right conferred by that provision to a fair, public and expeditious judicial procedure could prove to be largely devoid of substance. Likewise in this case, if it is correct to say that Article VI, Section 22, of the General Convention excludes an antecedent right to commence a journey from a Member State in connection with the performance of the expert's mission where the expert's presence in that State was for a purpose unconnected with the mission, it would follow that the right conferred on him by that provision to privileges and immunities "during . . . the time spent on journeys in connection with" such a mission (not to speak of other privileges and immunities) could turn out to be illusory, with the further result that the mission itself could remain undischarged.

While the situation in the *Golder* case differs in several respects from that here, at the level of principle it would seem to me that the reasoning in that case supports the conclusion that Article VI, Section 22, of the General Convention is applicable to enable an expert to leave any Member State for the purpose of carrying out his mission even if his presence in that State was for a purpose entirely unconnected with the mission.

(Signed) Mohamed SHAHABUDDEEN.