

SEPARATE OPINION OF SIR MUHAMMAD  
ZAFRULLA KHAN

I am in general agreement with the reasoning of those of my colleagues who hold the view that the Court should not deliver an Opinion in this case. I desire, however, to set down briefly the principal consideration which in my view should have prevented the Court from proceeding to deliver an Opinion.

The Court is a judicial body and in the exercise even of its advisory jurisdiction it must fulfil the requirements of its judicial character.

The judicial character of the function which the Court is called upon to perform requires, *inter alia*, that both sides directly affected by the proceedings before the Court should occupy a position of equality in all respects, including the submission of their views and arguments to the Court.

In the present case, under the Statute and the Rules of the Court, Unesco is entitled to submit its views in writing and to make oral submissions to the Court. The officials concerned are debarred from doing so.

This difficulty has been sought to be met by the adoption of a procedure under which the observations of the officials were made available to the Court through the intermediary of Unesco and by dispensing with oral proceedings. Both these courses are open to serious objection and, in any event, even their adoption did not put the parties in a position of complete equality.

It is true that no objection was raised on behalf of the officials concerned to the adoption of this procedure. This does not, however, absolve the Court from its responsibility of ensuring that parties directly affected by the result of the proceedings before the Court should be placed in a position of complete equality. A procedure under which one of the parties vitally concerned in the result of the proceedings can submit its views to the Court only by favour of and through its opponent can scarcely be described as judicial. In my opinion the Court should not countenance the adoption of such a procedure.

By dispensing with oral proceedings the Court deprived itself of a means of obtaining valuable assistance in the discharge of one of its judicial functions. Oral proceedings were dispensed with not because the Court considered that it could not receive any assistance through that means, but because the inequality of the parties in respect of oral hearings could not be remedied in any manner.

Even though the Court intimated that it had decided to dispense with oral hearings, it was open to any of the States or international

organizations entitled to appear before the Court, under paragraph 2 of Article 66 of the Statute, to request the Court for an oral hearing. If such a request had been received, the Court would have been confronted with a dilemma. It would have found it difficult to refuse the request. To grant it would have meant that the Court would thereby have disabled itself from delivering an Opinion. The Court finds itself able to deliver an Opinion in this case because no request for an oral hearing has been received. This means that in cases like the present, a single State or international organization to whom notice is sent under paragraph 2 of Article 66 can exercise a veto upon the Court's authority to deliver an Opinion. In my humble view, the Court should not comply with a request for an Advisory Opinion in a case which necessitates its having recourse to such procedures and devices.

*(Signed)* ZAFRULLA KHAN.