

## DISSENTING OPINION OF JUDGE WINIARSKI

[*Translation*]

I was, and remain, profoundly convinced that the Court should not have given the Opinion requested of it by the General Assembly; it is my duty to say why.

1. From the very beginning of the activities of the Permanent Court of International Justice, serious doubts and grave preoccupations arose concerning its advisory functions which were an innovation in the field of international jurisdiction introduced by Article 14 of the Covenant of the League of Nations. The important problem which the Court had to solve was to reconcile its advisory functions with its character as a court of justice, a judicial and independent organ of international law. Two dangers were to be avoided: on the one hand if its opinions were not invested with guarantees of thorough examination and objectivity they would run the risk of being regarded as mere legal utterances with no other authority than that of the names of their authors; and during the debate on the first Rules of Court (1922), Judge J. B. Moore said, rightly: "If the opinions are treated as mere utterances and freely discarded, they will inevitably bring the Court into disrepute." On the other hand, the danger existed of introducing compulsory jurisdiction through the indirect channel of advisory opinions. Article 14 of the Covenant gave the Court the power to give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly. In giving an advisory opinion on a legal question relating to a dispute actually existing between States, the Court would pronounce in fact, if not in law, upon the dispute itself for which, however, the party had not accepted its jurisdiction.

Hence the Permanent Court, from the very beginning of its activity, decided to ward off this double danger by investing the exercise of its advisory functions with judicial forms and guarantees. The famous case of Eastern Carelia (Opinion No. 5, 1923) permitted it to express in this connexion considerations which led it to refuse to give the Opinion which the Council had requested. The Permanent Court, which was then bound neither by texts nor by precedents, thus showed that it did not intend to be merely the adviser, *ad nutum advocabilis*, of the Council or of the Assembly; that it remained a court of justice, even when examining a request for opinion, acting in a judicial manner and respecting the principles of procedure, and above all, having a clear vision of the prospects open to its advisory action, of the advantages and dangers of this innovation. It felt that it was bound by principles and by the high conception it had of its Opinions.

Since then, the advisory procedure has developed in so far as the texts which regulate it are concerned: the Rules as revised in 1926 and 1927, the Statute as revised in 1929, and finally, the Rules as revised in 1936, show the different stages in this development, which all tend in the same direction: first convergence, then substantial assimilation of the two procedures; and the assimilation is almost complete in cases which refer to disputes which have actually arisen between two or more States. There is nothing arbitrary about this assimilation: the Committee of Jurists which was entrusted in 1920 with the elaboration of the Statute of the Permanent Court, clearly understood the difference between a legal question considered *in abstracto* and a dispute which might be settled by advisory procedure almost as much as by contentious procedure. Later, disputes of this kind were referred to the Court for advisory opinion by a political organ upon the initiative of the parties, and use has even been made of the term advisory arbitration, a new and interesting form of peaceful settlement of international disputes. It is the similarity in the two situations which determines the similarity in the procedure.

The principles respected by the Permanent Court were of two kinds; first, principles of procedure: the rule *audiatur et altera pars* and the equality of parties before the judge. At the Conference of 1929, a voice of authority (that of M. Fromageot, who later in the same year was elected as a judge of the P.C.I.J.) gave the following explanation of the revised Article 68 of the Statute: "It would be quite useless to give an advisory opinion after hearing only one side. For the opinion to be useful both parties must be heard. It is therefore quite natural to lay down in the Statute of the Court that, in regard to advisory opinions, the Court should proceed in all respects in the same way as in contentious cases." The Conference did not fail to show that it attached great importance to this explanation, and transmitted it to the Assembly.

Finally, and above the principles of judicial procedure, is the principle of international law according to which "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement" (Opinion No. 5); this is the principle of the independence of States expressed in the adage of old Polish law: *nihil de nobis sine nobis*. The attitude of the Permanent Court found confirmation in the Final Act of the Conference of States signatories to the Statute of the Permanent Court (1926), in respect of the second part of the fifth reservation of the United States of America, which was as follows: "The Court shall not, 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." In reply, the Final Act merely referred to the practice of the Court: "This jurisprudence, as formulated in Advisory Opinion No. 5 (Eastern Carelia),

given on 23rd July, 1923, seems to meet the desire of the United States." There is nothing to show that the Permanent Court ever departed from the principles laid down in Opinion No. 5.

The International Court of Justice cannot disregard the advisory practice of the old Court, which was so firmly established and accepted by international jurists as well-founded. The texts which regulate its advisory functions show that its powers and duties in this connexion have remained substantially the same; and if Article 65 of the Statute, in accordance with Article 96 of the Charter, has abandoned the distinction between "a question" and "a dispute", and refers to "any legal question", the difference is so much in the nature of things that Article 68 of the Statute has not been modified and Article 82 of the Rules of Court, in its new version, continues to point in the same direction: "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", and, if so, will apply the provisions of the Statute and of the Rules concerning contentious proceedings. It is true that the two texts add: "to the extent to which it recognizes them to be applicable", but there is nothing arbitrary about the Court's power in this matter; the criterion is objective: if the Court considers that such is the case, it must apply these provisions.

Though assimilated to contentious procedure, advisory procedure nevertheless maintains its own characteristics and cannot be identified with the former. Thus the parties to the dispute which has given rise to the Request for an Opinion, are regarded only as interested States although they may be authorized to designate judges *ad hoc*. Further, the Court is bound by the questions put to it in the Request for an Opinion and is not bound by the submissions of the parties, although these submissions lose none of their importance in determining the position of the parties.

The Committee of the Permanent Court which prepared the revision of the Rules in 1927 (application of Article 31 of the Statute to advisory opinions) stated in its report: "The Court, in the exercise of this power, deliberately and advisedly assimilated its advisory procedure to its contentious procedure; and the results have abundantly justified its action. Such prestige as the Court to-day enjoys as a judicial tribunal is largely due to the amount of this advisory business and the judicial way in which it has dealt with such business."

The doctrine of the Permanent Court is perfectly logical. Opinions are not formally binding on States nor on the organ which requests them, they do not have the authority of *res judicata*; but the Court must, in view of its high mission, attribute to them great legal value and a moral authority. This being the case and if *tantum valet*

*auctoritas quantum valet ratio*, the Court, as a judicial organ, will surround itself with every guarantee to ensure thorough and impartial examination of the question. For the same reason, States see their rights, their political interests and sometimes their moral position affected by an opinion of the Court, and their disputes are in fact settled by the answer which is given to a question relating to them, which may be a "key question" of the dispute. This explains the interest States have in being heard in advisory proceedings, in being represented and being permitted to designate their national judges, which would be perfectly useless if advisory opinions were mere utterances having no real importance in respect of their rights and interests. This is also why the Permanent Court did not hesitate to grant States the necessary guarantees, and, in order to exclude any possibility of introducing compulsory jurisdiction by the circuitous means of its advisory opinions, it deliberately laid down in Opinion No. 5 the principle of the consent of the parties (Article 36 of the Statute).

The Court must, therefore, consider each request for opinion from the point of view of principles from which as a judicial tribunal it cannot depart : *audiatur et altera pars*, the equality of States before the judge, the independence of States. It has no doubt the duty to give the opinions which are requested of it, for this is one of the two purposes for which it has been constituted ; but there may be important legal grounds for not giving an opinion, for example, respect for the principles which I have just recalled, or situations involving facts which make it impossible for the Court to give an opinion ; in such exceptional cases, the Court cannot deliver an opinion, and the texts contemplate this possibility as has been pointed out in the present Opinion.

Is the Court now confronted with such a case ?

2. First, do international disputes exist to which the present Request for Opinion relates ? This has been proved and a great number of arguments have been marshalled in support of this contention ; the Court is asked to say that such disputes exist, and that they refer to the interpretation and execution of the Peace Treaties. Only three of the eleven recitals of the Resolution of the General Assembly of 22nd October, 1949, mention human rights, eight mention the Peace Treaties and the disputes which have arisen in respect of these Treaties. It is stated under No. 3 of the conclusions of the representative of the British Government that : "This dispute relates principally to the question whether the three Governments are or are not in breach of the human rights provisions of the relevant Peace Treaties .... and the obligation to set up a Commission under the Peace Treaty provisions for the settlement of disputes .... there is therefore a dispute about both the interpretation and the execution of the Treaties." And, under No. 5 : "The United King-

dom is asserting its own rights under the Peace Treaties and claiming the fulfilment towards itself of the Treaty articles." Therefore : there is more than a legal question actually pending between two or more States ; real disputes exist. This is manifest, and I find no difficulty in answering the first part of Question I in the affirmative. But, if this is so, it is also evident that the Request referred to the Court not only relates to these disputes ; the Request goes to the very core of the disputes. The Assembly could discuss a "situation" existing in Bulgaria, Hungary and Romania concerning human rights, and it actually discussed this question at its Third Session ; since then the discussion has centered about Peace Treaties ; the diplomatic exchanges between the United States and the United Kingdom on the one hand and Bulgaria, Hungary and Romania on the other, also referred to the Peace Treaties. The four questions put to the Court all refer to the Peace Treaties. I should not hesitate to answer in the affirmative the question whether these are disputes for which the arbitration clauses of the Peace Treaties provide settlement procedure ; but here the Court enters the field of the interpretation of Treaties, and in my opinion it must refrain from giving an answer. The Court must not answer even a very simple question, one which any jurist could answer without difficulty, because the Court could do so only in conditions which are not fulfilled here.

I am taking Question II in its limited meaning in accordance with the restricted interpretation given in the Opinion. What is asked of the Court ? The Question does not refer to the human rights articles. A new, more limited dispute, referring to the interpretation and execution of the arbitration clauses, has arisen between the contracting States. It has been said that this is only an introductory question, a preliminary question, or a question of procedure. Question II may be an introductory or preliminary question in so far as the General Assembly is concerned, if the Assembly contemplates taking subsequent political action on the basis of the Court's answer, but this is not the legal or technical meaning of this term. Nor is it a question of procedure, although it does refer to the method of settling disputes concerning the interpretation and execution of the Peace Treaties. It is a question of substance ; not in respect of human rights, but of the arbitration clauses.

Question II is not put *in abstracto*, in view of a situation which might arise some day ; it has emerged out of long debate. The fact is that the three States have refused to appoint their representatives to the Treaty Commissions, in spite of the demands of their co-signatories. This refusal was discussed by the General Assembly and embodied in recital No. 9 ("have refused .... maintaining that they were under no legal obligation to do so"). If the General Assembly asks the Court : "are they obligated

to carry out", this question refers to the merits of the dispute concerning the execution of the arbitration clauses. The Assembly asks the Court to say whether the three States were right or wrong to refuse.

It has been said that if the Court were called upon to appraise the conduct of the three States, then the opinion would be equal to a judgment and a judgment delivered without the consent of the interested parties; and in such a case, the Court should not give its opinion. Actually, such a condemnation is involved if the Court says that the States are wrong to refuse to designate their representatives; and could the Court have said that they are right?

To say that they are obligated, whereas they denied that they were under any legal obligation to do so, means that the Court is pronouncing on the interpretation and application of the jurisdictional clauses of the Peace Treaties, and this in the first place is the prerogative of the high contracting parties themselves; the Court could not do so without their consent or, at least as a general rule, without their participation. The Court heard the interpretation and the conclusions of the United States and the United Kingdom; it did not hear statements by the three States.

Finally, the Court should not have ruled out the possibility of the three States submitting a valid excuse for their conduct. The fact is that they have refused to carry out the provisions of the Peace Treaties which relate to arbitration. They do not desire to carry them out. This refusal has as its context determined circumstances and conditions; it is a concrete case of non-execution of Treaties (which is half-way between violation and disregard). How can the Court say that *hic et nunc* the three States are obligated to carry out the provisions?

The refusal to carry out a certain clause of a treaty does not, unfortunately, arise here for the first time; this happens too often. There are also cases of legitimate refusal. *Pacta sunt servanda* constitutes the fundamental rule of international law and the basis of international relations; "respect for the obligations arising from treaties and other sources of international law" constitutes the primary duty of any State in its relations with other States. And yet, there are cases where it is necessary to readjust, even unilaterally, the application of the letter of the law to a new situation, just as the municipal judge may mitigate the excessive hardships of contracts between individuals; and there are cases in which a State may reasonably rely upon certain circumstances to justify, under international law, the non-execution of certain provisions of a treaty. Such a possibility is expressed by the *clausula rebus sic stantibus*, summing up the important problem of strict law and good faith between States.

The grounds given by the three States in the diplomatic exchanges to justify their refusal may be without value; but could they not submit other grounds and what might be the legal value of such grounds? Of this the Court knows nothing. In the circumstances, it seems to me that it is impossible for a court of justice to establish or determine the obligations of these States.

It is not necessary to discuss the remark which has been made, namely, that the three States have only to appoint their Commissioners and that the Commissions would pronounce on whether the charges preferred against them are well-founded. This is a misunderstanding: Question II asks the Court to say whether they are justified in refusing to appoint their Commissioners.

3. It has been said that the Court possesses all the facts in the case inasmuch as the three Governments in their notes said all that the Court needs to know before pronouncing. I cannot accept this argument. These notes have been put in by the opposite side as information and have solely the value of information. But the Court needs more than mere information, however complete it may be. What the parties said or have to say, must be said before the Court in proceedings which, though not contentious, do, nevertheless, call for the presentation from both sides of argument, declarations, objections, proof and submissions. Since this is impossible for the simple reason that the three Governments have refused to appear, the Court finds itself materially prevented from giving an opinion under the conditions laid down in its Statute and Rules.

If it is true that each case must be examined and decided in view of its peculiar characteristics and circumstances, it is equally true that, to individual cases, which may be infinitely varied, the same general rules and principles must apply. Now, in the present case, not only the provisions of the Statute and the Rules, but also the rule of equality of parties before the judge, as well as the rule *audiatur et altera pars*, that is to say, the fundamental principles of law and justice, would be disregarded, if the Court gave an opinion in the present conditions.

It might be objected that the three Governments were perfectly free to submit their arguments and evidence to the Court and that if they did not do so it was because they did not choose to avail themselves of the opportunity which was offered to them, and that consequently, the principle of equality has been respected. During the hearings, one of the representatives went so far as to rely on Article 53 of the Statute, which provides that whenever one of the parties does not appear before the Court, the other party may call upon the Court to decide in favour of its claim. However incredible this may appear to be, it was stated that the

Court can apply the rule of Article 53 to the present case by analogy. What is forgotten is that Article 53 refers to a case in which the Court has been validly seized by virtue of consent previously given by the party in default.

In the present case, the three States never gave their consent. The Resolution of the General Assembly of 22nd October may have constituted an offer: if this offer had been accepted by the three Governments, we might have been confronted by a case analogous to that of the *forum prorogatum*; but nothing of the kind occurred. Thus, another fundamental principle of international law makes it impossible for the Court to give its opinion in the present case: the principle of the independence of States. A jurisdiction, in our case the jurisdiction of the Court, even though it is exercising its advisory functions, cannot be imposed upon a State if that State has not given its consent freely and beforehand. In accordance with this principle, the authors of the Charter of the United Nations rejected not only the compulsory jurisdiction of the Court, but any jurisdiction whatever without the consent of the interested States—and this applies to Members of the United Nations. Nothing would be more alien or even contradictory to this idea, which is one of the bases of the Charter, than to introduce the compulsory jurisdiction of the Court under the guise of advisory opinions. This possibility, however, was considered as early as 1920 as a danger which might arise in a given case; the Permanent Court was deeply concerned with eliminating such a danger.

The Permanent Court attached no importance to the form in which consent to its jurisdiction was given; this could be effected merely *per facta concludentia*. But the three States have not accepted the jurisdiction of the Court in any form. Even more: the Peace Conference of 1946 had inserted a clause into the Peace Treaties providing for the jurisdiction of the International Court of Justice in the settlement of disputes concerning the interpretation and application of these Treaties; by a decision of the Foreign Ministers of the Allied Powers, this clause was deleted and was replaced by a clause providing for arbitration by Commissions to be set up for this purpose. Thus the Court was deliberately ruled out and its jurisdiction excluded, unless the high contracting parties should decide in common agreement to refer a certain case to it.

In respect of the interpretation and execution of the human rights articles and the arbitration clause, the three Governments may be at fault; here, on the particular point of the Court's jurisdiction, they are right.

4. During the oral proceedings, it was said that a State, however directly interested it may be, cannot interfere with relations

between organs of the United Nations and frustrate the desire of the General Assembly to request an advisory opinion of the Court.

It sometimes happens in domestic law that the most certain and indisputable subjective rights cannot obtain judicial protection because a rule of procedure, for example, a rule providing the period fixed for the exercise of some remedy has elapsed and the party is in default. This is inevitable, for behind the rules of procedure is a general interest of such importance that it overrides what may be very legitimate and very important particular interests. The same considerations apply to international procedure which is, however, much less severe. But what we have here is a much simpler case. If the opposition of a State can block the desire of the Assembly to obtain an opinion from the Court, it is because this opposition is grounded in law ; if, following the opposition of an interested State, the Court recognizes that it cannot deliver an opinion, it is because it has not the right to deliver it in such a case. In both cases, it is not the arbitrary action of an interested State that makes it impossible to deliver an opinion, but rather its will, which has the law on its side, provided the Court recognizes it.

To my regret, I cannot agree that the advisory functions of the Court are exercised between the Court on the one hand and the Assembly, the Security Council and other authorized organs on the other. In our case it is for the Assembly to take action on behalf of the Nations after having heard the opinion of the Court. The Request for Opinion is made publicly, the Opinion is delivered in public after proceedings which are public ; the Opinion is given to the organ from which the Request emanated, but is addressed to the parties, to the Organization, and to public opinion. The General Assembly has its own sphere of action, which is political, and its own responsibilities ; the Court too has its sphere of action which is legal, and the limits of the field to which this action may be applied, as well as the method of application, are rigidly laid down ; and the Court has its own responsibility which cannot disappear behind that of the Assembly.

(Signed) B. WINIARSKI.