Paragraph 14

Subject only to the terms of paragraph 13, the provisions of this Schedule in no way affect the laws and regulations governing the conditions of admission to, transit through, residence and establishment in, and departure from, the territories of the Contracting States.

Paragraph 15

Neither the issue of the document nor the entries made thereon determine or affect the status of the holder, particularly as regards nationality.

Paragraph 16

The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection.

RECHTSPRECHUNG

Entscheidungen internationaler Gerichte

The International Court of Justice 1947—1950

At the end of 1950 the International Court of Justice which had held its inaugural sitting on April 18th, 1946, but had not performed any judicial functions during that year, could look back upon a period of considerable activity and important achievements. Between May, 1947, when the first proceedings were instituted, and December, 1950, the Court had delivered judgments in five contentious cases and had given five advisory opinions. There were, in addition, then pending before the Court two contentious cases and one request for an advisory opinion.

The contentious cases which had been concluded by the end of 1950 were concerned with two sets of disputes: the dispute between Great Britain and Albania concerning the explosion of mines in the Corfu Channel which

resulted in damage to British property and in the loss of British lives [1]), and the dispute between Colombia and Peru concerning the legality or otherwise of the asylum granted by the Colombian ambassador in the Colombian Embassy in Lima to Haya de la Torre, a Peruvian subject who was accused by the Peruvian authorities of having instigated certain revolutionary activities in Peru [2]). The fact that these two disputes resulted in five separate cases and required seven different judgments was due to certain developments in the course of the proceedings, which will be referred to later.

Of the five advisory opinions given by the Court two were concerned with the admission of new Members to the United Nations [3]), one with the right of the United Nations Organisation to claim compensation for injuries suffered by officials acting in the service of the United Nations [4]), one with certain questions concerning the interpretation of the Peace Treaties with Bulgaria, Hungary and Rumania [5]), and one with the international status of South-West Africa [6]).

At the beginning of 1951 there were pending before the Court the dispute between Great Britain and Norway concerning the right of Norway to delimit the extent of her territorial waters for certain purposes [7]) and the dispute between France and the United States of America relating to the question of whether or not United States nationals are subject to certain laws enacted in Morocco [8]). There was also then pending a request for an

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[1]) The judgments in the *Corfu Channel Case* are reported in I. C. J. Reports 1947–1948, at p. 15 et seq. and in I. C. J. Reports 1949, at pp. 4, 171 and 244 et seq. respectively.

[2]) The judgments in the *Asylum Case* are reported in I. C. J. Reports 1950, at pp. 266 and 395 et seq., respectively, and in I. C. J. Reports 1951, at p. 71 et seq.

[3]) The first of these advisory opinions entitled "*Conditions of Admission of a State to Membership in the United Nations*" is reported in I. C. J. Reports 1947–1948, at p. 57 et seq., and the second entitled "*Competence of the General Assembly for the Admission of a State to the United Nations*" is reported in I. C. J. Reports 1950, at p. 4 et seq.

[4]) This advisory opinion entitled "*Reparation for Injuries Suffered in the Service of the United Nations*" is reported in I. C. J. Reports 1949, at p. 174 et seq.

[5]) The advisory opinions on the "*Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania*" are reported in I. C. J. Reports 1950, at pp. 65 and 221 et seq., respectively.

[6]) The advisory opinion on the "*International Status of South-West Africa*" is reported in I. C. J. Reports 1950, at p. 128 et seq.

[7]) Cf. *The Anglo-Norwegian Fisheries Case* instituted by Great Britain by application dated September 24th, 1949: I. C. J. Reports, 1949, at p. 233.

[8]) Cf. *The Case Concerning Rights of Nationals of the United States in Morocco* instituted by France by application dated October 27th, 1950: I. C. J. Reports 1950, at p. 391. Mention may also be made of the *Case Concerning the Protection of French Nationals and Protected Persons in Egypt* instituted by France against Egypt by application filed in the Registry of the Court on October 13th, 1949; this case was discontinued by the French Government, and was accordingly removed from the list of the Court by order dated March 29th, 1949: cf. I. C. J. Reports 1950, at pp. 59/60.

advisory opinion on the legal import of reservations to the Genocide Convention. This opinion was given by the Court on May 28th, 1951 [9]).

A. Contentious Cases

It may be recalled that by article 36, paragraphs 1 and 2 of the Statute, the Court is competent to exercise jurisdiction over the following matters: all cases which are referred to it by Special Agreement between the Parties, all matters specially provided for in the Charter of the United Nations or in treaties and conventions, and thirdly, all matters in relation to which the Parties have agreed to accept the compulsory jurisdiction of the Court.

I. The Corfu Channel Case

On October 22nd, 1946, two British cruisers and two British destroyers entered the Corfu Channel in a northerly direction. While passing through Albanian territorial waters, the two destroyers struck mines and were severely damaged by explosions which also resulted in the death of forty-five British sailors and in injury to forty-two others. On November 12th and 13th, 1946, the British Navy, having previously been refused permission by the Albanian government to carry out a mine-sweeping operation in Albanian territorial waters, carried out a sweep in the course of which twenty-two moored mines were cut.

On these facts Great Britain contended that Albania was responsible for the loss of British lives, the physical injuries inflicted upon British sailors and the material damage caused to the two destroyers. Albania, on the other hand, contended that both the passage of British warships through Albanian territorial waters on October 22nd, 1946, and the minesweeping operation on November 12th and 13th, 1946, constituted violations of Albanian sovereignty entailing the responsibility of the United Kingdom.

On May 27th, 1947, Great Britain instituted proceedings against Albania [10]) who raised a preliminary objection to the jurisdiction of the Court [11]).

1. ALBANIA'S OBJECTION TO THE JURISDICTION OF THE COURT

In submitting her application to the Court, Great Britain invoked article 36 (1) of the Statute and contended that the matter in dispute between

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[9]) Cf. I. C. J. Reports 1951, p. 15 et seq.

[10]) The case which is concerned with the merits of Great Britain's claim and Albania's counterclaim is referred to in the Reports as Case No. 1, *The Corfu Channel Case (Merits)*.

[11]) The case relating to Albania's procedural objection is referred to in the Reports as Case No. 2, *The Corfu Channel Case (Preliminary Objection)*.

the parties was one "specially provided for in the Charter of the United Nations", and as such was within the competence of the Court. Reliance was placed by Great Britain upon a resolution of the Security Council of April 9th, 1947, which had recommended "the parties to refer the dispute to the International Court of Justice", and it was accordingly argued on behalf of Great Britain that, as Albania had participated in the discussion of the dispute in the Security Council, she was bound by virtue of articles 25 and 36 of the Charter to accept the compulsory jurisdiction of the Court. The argument was ingenious, but failed to take account of the wording of article 25 of the Charter which is concerned with "decisions", and not with "recommendations" of the Security Council. It would, if accepted by the Court, have amounted to the surreptitious introduction of a case of compulsory jurisdiction of the Court not provided for in article 36 of the Statute.

Albania, while taking objection to Great Britain's interpretation of the Charter and the Statute, observed in a letter to the Court [12]) that she was "prepared, notwithstanding the irregularity in the action taken by the Government of the United Kingdom, to appear before the Court". The same letter also contained a passage that "the Albanian Government wishes to emphasize that its acceptance of the Court's jurisdiction for this case cannot constitute a precedent for the future". It would seem from the passages quoted above that whatever the legal merits of Albania's objection to the competence of the Court, she had clearly submitted to its jurisdiction. This, in fact, was the view taken by a majority of the judges [13]).

It is unfortunate that the eight judges who constituted the majority of the Court considered it unnecessary to pronounce upon the validity of the British argument, as they took the view that Albania's voluntary submission as expressed in her letter to the Court was sufficient to found the jurisdiction of the Court [14]). Seven judges, however, considered that, logically, the question of compulsory jurisdiction fell to be decided first [15]). They – it is submitted, rightly – rejected the British argument, not only on the ground that the word "recommendation" has a specific meaning, but also on the

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[12]) The letter was dated July 2nd, 1947, and its contents will be found in I. C. J. Reports 1947–1948, at pp. 18–19.

[13]) Cf. I. C. J. Reports 1947–1948, at p. 27. Dr. Daxner, judge ad hoc, dissented from the majority opinion of the Court; see infra. A useful summary of the contentions of the Parties concerning the preliminary objection can be found in the International Law Quarterly, vol. 2 (1948), pp. 35–40.

[14]) I. C. J. Reports 1947–1948, at p. 26.

[15]) These seven judges (Judges Basdevant, Alvarez, Winiarski, Zoričič, de Visscher, Badawi Pasha and Krylov) delivered a joint separate opinion: loc. cit. at pp. 31 and 32. They agreed, however, with the conclusion of the majority and overruled Albania's preliminary objection.

ground that the jurisdiction of the Court is founded upon the consent of States.

The Court also dealt with Albania's contention that a dispute between Parties who are not mutually bound by any treaties or conventions as provided by article 36 (1) of the Statute can be referred to the Court only by the notification of a Special Agreement, and not unilaterally by the application of one party. This contention was rejected, and the inference would seem to be justified that all disputes, without exception, can be submitted to the Court by unilateral application [16]). Such an application may, of course, be resisted on the ground that the Court has no jurisdiction, the question of procedure being entirely distinct from that of jurisdiction.

The only dissenting opinion was delivered by Dr. D a x n e r, judge ad hoc. While agreeing with those of his brother judges who had rejected Great Britain's argument that a recommendation of the Security Council under article 36 (3) of the Charter imposes upon the Parties the compulsory jurisdiction of the Court, he dissented from the majority view that Great Britain was entitled to bring the case before the Court by means of a written application pursuant to article 49 (1) of the Statute [17]). Dr. Daxner who relied largely on the 'travaux préparatoires' relating to the Statute of the Permanent Court took the view that the only cases which can be brought before the Court by means of a written application are those in which the compulsory jurisdiction of the Court has been recognized by the Parties as provided in article 36 (2) of the Statute. It is submitted that this view is based upon the mistaken premiss that articles 36 and 40 of the Statute deal with the same subject-matter whereas, in fact, article 36 (as part of Chapter II) is concerned with the competence of the Court and article 40 (as part of Chapter III) with procedure before the Court, viz. with the means by which proceedings can be instituted.

With regard to the letter of July 2nd, 1947, addressed by Albania to the Court, and which the other 15 judges had interpreted as a voluntary submission by Albania to the jurisdiction of the Court, Dr. Daxner made an ingenious distinction between two different meanings to be attached to the word "jurisdiction". In his view "jurisdiction" may be either the right of '*ius dicere*' in a general sense or the right to judge a concrete case [18]). From the point of view of the Party whom it is sought to bring before the Court it may, therefore,

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[16]) See. e. g. C. H. M. W a l d o c k: Forum Prorogatum or Acceptance of a Unilateral Summons to Appear before the International Court, in International Law Quarterly, vol. 2 (1948), at p. 390.

[17]) See I. C. J. Reports 1947–1948, at p. 35.

[18]) Loc. cit., at p. 39.

mean either the ability of that Party to appear before the Court or that Party's consent to submit a concrete case to the jurisdiction of the Court. Dr. Daxner interpreted Albania's letter in the former sense and concluded that, although Albania was entitled to appear, she was not bound to do so. He concluded by saying that "for the time being" the Court was not competent to judge the merits of the case [19]). This presumably meant that in his view the case could not be brought before the Court unless and until a Special Agreement was arrived at between the Parties.

2. THE COURT'S JUDGMENT ON THE MERITS OF THE CORFU CHANNEL CASE

In the event, the dispute concerning the preliminary objection became purely academic, for on March 25th, 1948, the Parties concluded a Special Agreement submitting the following questions to the Court:

(1) "Is Albania responsible under international law for the explosions which occurred on the 22nd October, 1946, in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?"

(2) "Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November, 1946, and is there any duty to give satisfaction?"

Accordingly, the case proceeded on the basis of the Special Agreement between the Parties, and judgment was delivered on April 9th, 1949 [20]).

(a) Albania's Responsibility under International Law

The first question which fell to be decided by the Court was that of Albania's responsibility under international law. This was largely a question of fact on which the views of the Court may be conveniently summarised as follows: All members of the Court were agreed that there was not sufficient evidence that the minefield had been laid by Albania or with Albania's connivance. On the other hand, the majority expressed the view that Albania must be regarded as having had knowledge of the fact that mines had been laid in her territorial waters [21]). Albania had previously conceded that, if

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[19]) Loc. cit., at p. 45.

[20]) Cf. I. C. J. Reports 1949, at p. 4 et seq. For the proceedings relating to the merits of the case Dr. Ečer, of Czechoslovakia, had been chosen by Albania to sit as judge ad hoc, in accordance with article 31 (2) of the Statute. The Court therefore consisted of 16 judges.

[21]) Loc. cit., at p. 22. Judges Winiarski, Badawi Pasha, Krylov and Ečer (judge ad hoc) held that Albania's knowledge had not been established: pp. 56, 64,

she had been informed of the laying of the mines in sufficient time to warn British vessels of the existence of the minefield, "her responsibility would be involved". As the majority of the Court found that Albania could have issued the requisite warning in time, it had no difficulty in concluding from her failure to do so her responsibility for the explosions [22]).

Of the dissenting judges, Judge Badawi Pasha expressed the view that knowledge could not exist where neither connivance nor collusion had been proved [23]). Although, in his view, there was strong suspicion both of connivance and of knowledge, he considered the evidence to be insufficient to support the decision at which the majority of the Court had arrived. Further, he considered that there did not, in the absence of knowledge, exist any duty to exercise vigilance, and he therefore held that Albania was not responsible for the explosions [24]).

Similarly, Judge Krylov, who also negatived Albania's connivance as well as her knowledge, held that international law imposed no obligation upon the coastal State to exercise vigilance over its territorial waters [25]). Accordingly, he held that Albania was not responsible for the explosions on October 22nd, 1946.

Judge Azevedo, in a dissenting judgment which deserves to be studied closely for its skilful exposition of the doctrine of '*culpa*' in international law, was not satisfied that Albania's knowledge had been established by the evidence, but, basing his decision on this carefully developed doctrine he arrived at the conclusion that Albania had neglected to exercise proper vigilance over her coastal waters and that for that reason alone she was responsible for the explosions which had occurred [26]).

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71 and 126, respectively. Whilst Judges Badawi Pasha, Krylov and Ečer concluded therefrom that Albania could not be held responsible under international law for the explosions, Judge Winiarski took the view that, irrespective of knowledge, Albania must be held responsible for having failed to exercise such supervision and control over the navigable channels of her territorial waters as would have ensured their safety: loc. cit., at p. 56.

22) Loc. cit., at p. 23. The Court pointed out that the obligation to notify the existence of a minefield in time of peace does not, as had been argued by Great Britain, flow from the provisions of the Hague Convention No. VIII, 1907, but from elementary considerations of humanity.

23) Loc. cit., at p. 61.

24) Ibid., at p. 65.

25) Loc. cit., at p. 71. This proposition appears to be arguable, but there is no authority for saying, as does Judge Krylov at p. 69, that circumstantial evidence is insufficient in international law to establish the responsibility of a State. The rules of evidence in proceedings before the International Court and in relation to the responsibility of States do not differ from the rules of evidence applicable in other courts of law. This was also the view of Judge Azevedo as expressed in his dissenting judgment: ibid., at pp. 90–91.

26) Loc. cit., at pp. 92 and 94.

(b) The Court's Competence to Assess the Amount of Compensation

The question of Albania's responsibility having been decided in favour of Great Britain by a majority of the Court, the question arose whether, under the terms of the Special Agreement between the Parties, the Court was competent to assess the amount of compensation payable by Albania. It may be recalled that the first question submitted to the Court contained the words: ". . . . . and is there any duty to pay compensation?" The Court took the view that these words would have been superfluous if the parties had intended merely to ask the Court for a declaratory judgment on the question of responsibility. Also, in view of the fact that the Parties had referred "the dispute" to the Court as a result of a recommendation of the Security Council, they must be taken to have intended the Court to proceed to a final adjudication upon all matters in dispute between them. Accordingly the Court held itself competent to assess the amount of compensation in subsequent proceedings[27]). Judge Winiarski, while agreeing, though on different grounds, that Albania's responsibility had been established, took the view that the Court was not competent to assess the amount of compensation payable by Albania[28]). The same view was adopted by Judges Badawi Pasha, Krylov, Azevedo and Ečer[29]).

(c) Albania's Counterclaim

In support of her counterclaim, Albania contended that the British Navy had violated Albania's sovereignty both on the occasion when the two destroyers were damaged on October 22nd, 1946, and on the occasion when the minefield was swept on November 12th and 13th, 1946, without Albania's consent. These contentions gave rise to important pronouncements on the right of innocent passage of warships in time of peace, on the meaning of the term "innocent passage" and on the right of intervention.

The Court considered it to be a generally recognised rule of international law that warships are entitled, in time of peace, to pass through international highways used for international navigation between two parts of the high seas, and that, provided the passage is innocent, the exercise of that right does not require the previous authorisation of the coastal State[30]). The Corfu Channel was held to be an international highway to which this principle

[27]) An order for the delivery of pleadings concerning this matter was made on the same day: I. C. J. Reports 1949, at pp. 171–172.
[28]) Ibid., at p. 57.
[29]) Ibid., at pp. 67, 73, 99 and 128 respectively.
[30]) I. C. J. Reports 1949, at p. 28.

applied. Further, on the facts of the case, the Court took the view that the passage of British warships on the first occasion was "innocent" and did not, therefore, constitute a violation of Albania's sovereignty [31]). This view was not shared by Judges K r y l o v and A z e v e d o, who both held that, on the facts, the passage of warships on October 22nd, 1946, could not be considered innocent. In addition, Judge A z e v e d o denied to the Corfu Channel the Character of an international highway.

With regard to the second occasion, i. e. the minesweeping operation on November 12th and 13th, 1946, the majority of the Court took a different view from that relating to the passage on October 22nd. Great Britain did not deny that this operation was carried out against the wishes of the Albanian Government, and she admitted herself that the operation could not be justified as an exercise of the right of innocent passage. In justification of her action she contended, however, that the urgent need to secure possession of the evidence relating to the explosions on October 22nd, 1946, entitled her to exercise a right of intervention. The Court rejected this contention as well as the further contention that Great Britain was justified, in view of Albania's failure to carry out her duties after the explosions, to take measures of self-help. The Court's condemnation of these alleged rights of intervention was expressed in the following words:

> "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself" [32]).

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[31]) Loc. cit., at p. 31. It is regrettable that, as a result of the Court's finding of fact that the Corfu Channel is an international highway, it became unnecessary for the Court to consider the much-debated question whether States are entitled, in time of peace, to send warships through territorial waters not included in straits: ibid., at p. 30. Judge A l v a r e z, in his individual opinion, appeared to take the view that only warships engaged in an international mission on behalf of the United Nations enjoy an unrestricted right of passage. There is no authority for this proposition which is based entirely on Judge Alvarez' theory of international law: cf. loc. cit., at p. 47. Judge A z e v e d o examined the problem with great care and arrived at the conclusion that the Codification Conference of 1930 had left the matter in such doubt that the right of a State to send warships through the territorial waters of another State could not be said to be part of existing law. He concluded by saying that "the passage of warships through territorial waters is subject to a precarious regime which may be modified, in a reasonable manner, by the coastal State": ibid., at p. 101.

[32]) I. C. J. Reports 1949, at p. 35. The view of the majority of the Court that the mine-sweeping operation on November 12th and 13th, 1946, violated the sovereignty of

The judgment of the Court on the questions submitted for decision may be summarised as follows [33]).

1. By eleven votes to five Albania was held responsible for the explosions on October 22nd, 1946.
2. By ten votes to six the assessment of the amount of compensation payable to Great Britain was reserved for further consideration.
3. By fourteen votes to two it was held that Great Britain had not violated the sovereignty of Albania on October 22nd, 1946.
4. By a unanimous vote of the Court it was held that Great Britain had violated Albania's sovereignty on November 12th and 13th, 1946 [34]).

In view of the majority decision that the Court was competent to assess the amount of compensation due to Great Britain, further proceedings became necessary, and the Corfu Channel Case accordingly entered its third phase.

3. THE ASSESSMENT OF THE AMOUNT OF COMPENSATION DUE TO GREAT BRITAIN

Albania, instead of adducing evidence of her own to contradict the estimate of damage submitted by Great Britain, attempted to put the clock back by again asserting that the Court was not competent to assess the amount of her liability. In view of the judgment of April 9th, 1949, however, in which it had been held that the Court was competent to assess the amount of compensation, it was no longer open to Albania to dispute the competence of the Court. Albania's failure, therefore, to submit within the time-limit fixed by the Court her own statement relating to the issue of damages necessarily brought into operation article 53 of the Statute. The Court, therefore, did not feel itself obliged to examine in detail the accuracy of the figures submitted by Great Britain [35]). By twelve votes to two the Court fixed the amount of compensation due to Great Britain at £ 843,947, viz £ 700,087 for the loss of the destroyer "Saumarez", £ 93,812 for the damage sustained by the destroyer "Volage", and £ 50,048 for pensions and grants payable by the British government to the victims of the explosions and their dependants.

Albania was shared by Judge Alvarez in his individual opinion, and by all the judges who on other matters dissented from the majority view, i. e. Judges Winiarski, Badawi Pasha, Krylov, Azevedo and Ečer.

[33]) J. Mervyn Jones: "The Corfu Channel Case: Merits", British Year Book of International Law, vol. XXVI, 1949, pp. 447–453, gives a useful summary of what he calls "the learning to be collected from the judgment".

[34]) I. C. J. Reports 1949, at p. 36.

[35]) Cf. I. C. J. Reports 1949, at p. 248: "It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded".

Judges K r y l o v and E č e r dissented from the majority judgment, and it may be inferred from Judge Ečer's dissenting opinion that in his view the Court ought not to have accepted Great Britain's figures without subjecting them to a more detailed analysis. In fact, the Court had based its assessment on a careful examination of reports submitted by neutral experts.

Judge E č e r also differed from the Court on a point of legal principle. While the majority of the judges took the view that the damage sustained by Great Britain as a result of the loss of the destroyer "Saumarez" was equivalent to the replacement value of the ship (less depreciation) on the date of the explosion, Judge Ečer considered that the damage sustained was the price Great Britain had paid for the ship on the date of delivery (less depreciation). As the ship had been delivered in 1943 and prices had risen considerably between then and 1946, there was an appreciable difference between the two figures. It is submitted that on elementary principles of the law of tort the view of the majority of the Court is correct, and that Judge Ečer allowed extraneous considerations to guide his decision when he said:

> "The rise and fall in prices is a factor not depending on the author of the illegal act, and therefore one for which he cannot be held responsible" [36]).

With the delivery of the Court's judgment on the amount of compensation payable to Great Britain the protracted litigation between Great Britain and Albania came to an end with a clear-cut decision which established Albania's responsibility for a serious violation of international law and determined the amount of compensation payable by her. It is regrettable that Albania has so far refused to satisfy the judgment and has gone on record as the first country in the history of the International Court of Justice and of its predecessor, the Permanent Court of International Justice, to defy a judgment of the World Court [37]). The judgment may have to be satisfied against Albania's will provided that certain stocks of gold at present held by the Tripartite Gold Commission, which are claimed both by Italy and Albania, are found to belong to Albania. If so, these stocks of gold will be used to satisfy Great Britain's claim [38]). This procedure may offend the susceptibilities of those who hold that compulsory execution of judgments of the International Court offends the principles on which the jurisdiction

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[36]) Loc. cit., at p. 255.

[37]) Before the new World Court began to exercise its judicial functions, Sir Arnold D. M c N a i r had occasion to draw attention to the fact that between 1922 and 1940 no single instance had been recorded of a country refusing to carry out a judgment of the Permanent Court: "International Law in Practice", in International Law Quarterly, vol. 1 (1947), at p. 12.

[38]) As to this, see International Law Quarterly, vol. 4 (1951), at p. 388.

of the Court is founded. On the other hand, it cannot be doubted that a refusal to carry out decisions of the Court is equally unprecedented and even more reprehensible.

II. The Colombian-Peruvian Asylum Case

On October 3rd, 1948, a military rebellion broke out in Peru, and in a Presidential Decree published on the following day in Lima, the American People's Revolutionary Alliance, of which Señor Victor Raúl Haya de la Torre was the leader, was charged with having organised the rebellion. A few days later the examining magistrate issued an order for the opening of criminal proceedings against Haya de la Torre for the "crime of military rebellion". Almost three months later, on January 3rd, 1949, Haya de la Torre, in order to escape prosecution by the Peruvian judicial authorities, sought asylum in the Colombian Embassy in Lima. The asylum was granted by the Colombian Ambassador who informed the Peruvian Ministry of Foreign Affairs that asylum had been granted in accordance with article 2 (2) of the Havana Convention, 1928, which provides that "asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety". The Ambassador requested the Ministry to grant to Haya de la Torre a safe-conduct enabling him to leave Peru.

A few days later, the Colombian Ambassador sent a further note informing the Ministry that the Colombian Government, in accordance with the right conferred upon it by article 2 of the Montevideo Convention on Political Asylum, of December 26th, 1933, had qualified Haya de la Torre as a "political refugee".

The grant of a safe-conduct having been refused by Peru, the Parties decided to submit the dispute to the Court, and to this end they signed a Special Agreement on August 31st, 1949. As they had been unable to reach agreement on the terms in which they desired the dispute to be brought before the Court, each Party reserved the right to commence proceedings by application. On October 15th, 1949, Colombia submitted her application thus instituting proceedings which were to stir political feeling in Latin America to an extent never realised in Europe. Meanwhile, Haya de la Torre unable to leave Peru in safety had remained in the Colombian Embassy in Lima.

1. THE FIRST JUDGMENT OF THE COURT IN THE ASYLUM CASE

The Court delivered its first judgment on November 20th, 1950, by which date Haya de la Torre had spent almost two years at the place of

refuge he had chosen on January 4th, 1949[39]). The contentions of the Parties may be summarised as follows: Colombia claimed (a) that she was entitled to qualify Haya de la Torre as a political offender, as distinct from a common criminal, and (b) that Peru was bound to give "the guarantees necessary for his departure (from Peru), with due regard to the inviolability of his person". Peru, on the other hand, contended (a) that Colombia was not entitled to qualify Haya de la Torre as a political refugee, (b) that Peru was not bound to give the guarantees for which Colombia had asked, and (c) that the asylum had been granted in violation of articles 1 (1) and 2 (2) of the Havana Convention of 1928[40]).

The narrow ambit within which the respective claims of the Parties were framed made it almost impossible for the Court to decide the issues other than in a legalistic manner. The issues before the Court were not, as will be seen, whether Haya de la Torre should be handed over to the Peruvian authorities or whether he should be allowed to leave the Colombian Embassy in Lima in safety; they were concerned only with an authoritative interpretation of the Havana Convention, and to a lesser extent, with a pronouncement on customary law relating to asylum. The limitations which the Parties themselves had put upon the jurisdiction of the Court were largely responsible for the protracted proceedings and the inconclusive outcome of the dispute. It is important to bear these limitations in mind in order to avoid reading into the judgment more than it was intended, or indeed entitled, to decide.

(a) First, the Court dealt with Colombia's submission that she was entitled to qualify Haya de la Torre, unilaterally and definitively, as a political refugee. It was, of course, not disputed that initially the Colombian Ambassador was entitled to exercise his judgment in admitting the refugee to the Embassy when he first asked for asylum. It was clear, however, that a claim by the Ambassador's Government to pass judgment unilaterally and definitively on the permanent status of a refugee went beyond the spontaneous exercise of the discretion of the person who had made the initial decision. The Court, therefore, took the view that such a claim could not be upheld unless it could be substantiated.

In the opinion of the Court a right of unilateral and definitive qualification cannot be deduced from general principles of international law, and

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[39]) The first judgment, Case No. 7 in the List of the Court, is reported in I. C. J. Reports 1950, at p. 266 et seq.

[40]) The relevant part of article 2 (2) of this Convention has already been set out. Article 1 (1) provides as follows: "It is not permissible for States to grant asylum ... to persons accused of or condemned for common crimes".

certainly not, as had been argued by Colombia, from an analogous application of the right to refuse extradition [41]). Nor can the right be deduced from article 2 (1) of the Havana Convention which provides that "asylum ... shall be respected to the extent in which it is allowed ... by the ... laws of the country in which it has been granted ..." The Court considered it erroneous to interpret this provision as meaning that the country which grants asylum can invoke its own laws against the country in the territory of which asylum is granted.

The argument which gave rise to observations of more general legal interest was based on Colombia's assertion that customary "American international law", and in particular "Latin American international law" contained such a right of unilateral and definitive qualification [42]). The existence of such regional customary law was denied by the Court on the ground that Colombia had failed to prove a constant and uniform usage by the States concerned. Colombia's first claim, therefore, failed, and the Court held by fourteen votes to two that Colombia was not entitled to qualify the nature of the offence by a unilateral and definitive decision [43]).

Judge Alvarez, in his dissenting opinion, went as far as to assert the existence not only of American international law, but also of European international law and of Asian international law which he considered to be in the process of formation [44]). This extreme view has never been shared by any of the other judges, and it has, fortunately, no appreciable following among international lawyers. If it were accepted, it would undo much of what has been achieved in the course of the last three centuries, and it is clear from this and other judgments of Judge Alvarez that such retrogression is not what he himself desires. On the contrary, he is frequently at pains to point out that it is the duty of the Court to assist in the development of international law in accordance with the high principles enunciated in the United Nations Charter.

In the present case Judge Alvarez reviewed the history of diplomatic asylum in South America and dealt with its special significance in countries where revolutions occur with greater frequency than in other parts of the world. This essentially regional approach to the problem did not, however,

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41) See I. C. J. Reports 1950, at p. 274. Extradition differs fundamentally from diplomatic asylum. In the former case the refugee is in the territory of another State, and in the latter case he is in the territory of the home State.

42) The dissenting judgments of the South American jugdes (Alvarez, Azevedo and Caicedo Castilla [judge ad hoc chosen by Colombia]) contain observations on "American international law" which are somewhat disturbing to those for whom the terms "International Law" and "universality" are practically synonymous. See infra.

43) I. C. J. Reports 1950, at p. 288.

44) Loc. cit., at p. 294.

cause him to differ from the majority decision of the Court on Colombia's first submission. He, like the majority, held that Colombia was not entitled unilaterally and definitively to qualify Haya de la Torre as a political offender. But he considered that the Court would have been competent to declare that Haya de la Torre was a person accused of a political offence[45]). Such a declaratory judgment would have been more satisfactory to both Parties, in that it would have decided one vital issue between them in a practical manner.

Judge Azevedo and Caicedo Castillo also favoured the regional approach. However, whilst Judge Azevedo rejected Colombia's first submission, Judge Caicedo Castilla upheld it[46]). It is, therefore, in view of the voting strength of fourteen to two, not quite clear who the second dissenting judge was in relation to Colombia's first submission.

(b) Colombia's second submission was that Peru was bound to give all necessary guarantees for the departure of Haya de la Torre, with due regard to the inviolability of his person. This submission was based on the following provision contained in article 2 of the Havana Convention:

> "The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee from the country with due regard to the inviolability of his person".

The Court laid particular stress upon the words "in turn" in the latter part of this provision and concluded therefrom that, unless the territorial State had requested the departure of the refugee, the State which had granted the asylum could not demand a safe-conduct[47]). As Peru had never requested Haya de la Torre's departure, it was evident that Colombia was not entitled to request the grant of a safe-conduct. There can be little doubt that the conclusion of the Court was in accordance with the clear wording of this part of article 2, and the decision on this submission was reached by fifteen votes to one, the only dissenting opinion being that of Judge Caicedo Castilla[48]).

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[45]) Ibid., at p. 300.

[46]) Ibid., at pp. 347 and 360, respectively. It would appear from an analysis of Judge Azevedo's judgment, that, while in principle recognising the right of the State which grants asylum to qualify the offence unilaterally and definitively, such qualification must be subject to revision. In the case under review he considered that the qualification lacked such "stability" as would give it the character of "res judicata": pp. 347–348. In this respect Judge Azevedo's dissenting judgment is somewhat obscure.

[47]) Loc. cit., at p. 279.

[48]) Ibid., at pp. 372–373. Judge Caicedo Castilla based his view on what he called the unanimous practice of American States by which the requests of diplomatic

(c) Peru's counterclaim was twofold: firstly, that the asylum had been granted in violation of article 2 (2), item 1, of the Havana Convention, and secondly, that the maintenance of the asylum "constitutes at the present time" a violation of the Havana Convention [49]).

In framing her submissions in this way Peru relied on articles 1 (1) and 2 (2) of the Havana Convention. Article 1 (1) provides that "it is not permissible for States to grant asylum ... to persons accused of or condemned for common crimes ..."; article 2 (2) provides that "asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety".

On the first point the Court had no difficulty in arriving at the conclusion that Haya de la Torre was not a person accused of "common crimes" [50]). This part of Peru's counterclaim, therefore, was dismissed by fifteen votes to one [51]).

On the second point the Court had to consider the question of "urgency" referred to in article 2 (2) of the Convention. Having regard to the length of time which had elapsed between the issue of the summons against Haya de la Torre by the Peruvian judicial authorities on November 16th, 1948, and January 3rd, 1949, the day on which he sought asylum in the Colombian Embassy in Lima, the Court held that there was not present the element of "urgency" required by article 2 (2). But, in view of an allegation by Colombia that Haya de la Torre was in danger of becoming the victim of a system of political justice established as a result of the rebellion, it became necessary for the Court to consider whether such a danger could be regarded as an "urgent case" and thus a basis for the grant of asylum. The Court held that the danger of political justice was not a danger which the Havana Convention intended to guard against, and that to ascribe to the Havana Convention an intention to provide general protection against judicial prosecutions would be tantamount to interfering in the administration of

agents for the departure of refugees are said always to have preceded the requests by territorial governments.

49) The latter submission, viz. the submission concerning the maintenance of the asylum, was only made in the course of the oral proceedings. It was not contained in the counterclaim as presented initially. The Court, nevertheless, considered itself competent to deal with this second submission: loc. cit., at p. 280.

50) Ibid., at p. 282. Article 248 of the Peruvian Code of Military Justice on which the Peruvian magistrate had based the indictment against Haya de la Torre makes a distinction between "common crimes" and "rebellion", the latter being impliedly regarded as a political offence.

51) Ibid., at p. 288. The dissenting vote would appear to be that of Judge Alayza y Paz Soldán, the Peruvian judge ad hoc, who did not, however, deliver a dissenting judgment.

justice in the territorial State. In the result, the Court, by ten votes to six, found that the asylum had, "for a reason not recognised by article 2 (2) of the Havana Convention", been prolonged beyond January 4th, 1949[52]). The dissenting judges were Judges Alvarez[53]), Zoričič[54]), Badawi Pasha[55]), Read[56]), Azevedo and Caicedo Castilla.

In the result, the majority judgment of the Court, while deciding the dispute between the Parties, left the personal fate of Haya de la Torre in suspense, not because the majority of the judges took too formalistic a view of the law, but because the Parties themselves had failed to submit the vital issues to the Court for final adjudication. The wrath of some sections of the Latin-America Press should, if the true significance of the issues had been fully understood, have been concentrated upon the Parties themselves and not upon the Court. The Court had discharged its functions with due regard to its jurisdictional competence and had, moreover, taken due account of the regional significance of the right of asylum in Latin-America. That its decision was in the result tantamount to a "*non-liquet*" as far as Haya de la Torre personally was concerned was due to a sequence of events over

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[52]) Ibid., p. 287. This finding made it unnecessary for the Court to deal with Peru's submission that "the maintenance of the asylum constitutes at the present time a violation of the Convention".

[53]) Judge Alvarez took the view that the existence of the dispute between the Parties justified Colombia in maintaining the asylum beyond January 4th, 1949: I. C. J. Reports 1950, at p. 302.

[54]) Judge Zoričič did not deliver a dissenting opinion; he merely intimated his dissent.

[55]) Judge Badawi Pasha considered that protection against mob violence was not the only "urgent case" in the contemplation of article 2 (2) of the Havana Convention, but that, on the contrary, this provision included danger arising from the administration of justice by a political faction: ibid., pp. 304 and 307. On the facts Judge Badawi Pasha found that this danger existed in Peru after January 4th, 1949, and that, consequently, Colombia was entitled to maintain the asylum beyond that date.

[56]) Judge Read, while rejecting the view that Colombia had adduced any evidence to show that the Peruvian administration of justice was political in character, deduced from the history of the Havana Convention that the protection it intended to confer upon political offenders was not merely protection against mob violence: ibid., p. 322. In his view the term "urgent cases" covered judicial proceedings in a period of political disturbance. Having reached that conclusion, the question remained whether January 4th, 1949, could still be regarded as falling within a period of political disturbance in Peru. This question was answered in the affirmative, and Judge Read accordingly held that the grant of asylum, as distinct from its maintenance, had not been made in violation of article 2 (2) of the Havana Convention. Judge Read felt unable to deal with Peru's claim regarding the maintenance of the asylum, on the ground that this claim had not been put forward until after the beginning of the oral proceedings and had thus deprived Colombia of the right to deal with this belated claim in her reply. In this respect also Judge Read dissented from the majority of the Court.

which no control can be exercised by a tribunal which for its jurisdiction depends upon the consent of the Parties[57]).

The legal position on November 20th, 1950, therefore, was this: Colombia, although held to have been entitled initially to grant asylum to Haya de la Torre, was henceforth precluded from maintaining it. On the other hand, she was not entitled to request from Peru the granting of a safe-conduct, because Peru had not requested the surrender of the refugee. Unless, therefore, Haya de la Torre was prepared to incur the risk of leaving the Colombian Embassy in Lima of his own accord and of submitting to the jurisdiction of the Peruvian judicial authorities, he had no alternative but to remain in the Colombian Embassy. Yet, his continued residence there had, as a result of the Court's judgment, become illegal. Haya de la Torre chose to remain in voluntary confinement, but it was obvious that the position in which he and the Parties to the dispute found themselves was highly unsatisfactory.

Judge A z e v e d o saw the position only too clearly, and in his dissenting judgment he freely admitted that the decision had resulted in deadlock. He pointed out, however, that this result could have been avoided if the Parties had agreed to ask the Court to decide the issues between them *"ex aequo et bono"*, pursuant to article 38 (2) of the Statute[58]). He expressed the hope that the apparent incompatibility between the various findings of the Court might encourage the Parties to arrive at an amicable settlement.

This hope was not fulfilled, and the dispute entered its second phase on the very day when judgment had been delivered in the first.

2. THE SECOND JUDGMENT OF THE COURT IN THE ASYLUM CASE[59])

Colombia, in a letter addressed to the Registry of the Court on November 20th, 1950, requested the Court to interpret the judgment in accordance with article 60 of the Statute and article 79 of the Rules. She alleged that the judgment contained certain gaps which required clarification and submitted the following questions to the Court:

(a) Must legal effect be given to the qualification of Haya de la Torre's offence as made by the Colombian Ambassador and as confirmed by the Court?

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[57]) L. C. G r e e n, in International Law Quarterly, vol. 4 (1951), p. 233 and 238, criticises the "narrow and legalistic" view of the Court with regard to the Havana Convention and prefers the "functional" approach of the minority. His criticism is based on a misconception and would have been more properly directed against the Parties themselves.

[58]) I. C. J. Reports 1950, at p. 357.

[59]) This is Case No. 13 in the Court's List; I. C. J. Reports 1950, p. 395 et seq.

(b) Does the judgment of the Court mean that Peru is not entitled to demand the surrender of Haya de la Torre and that, consequently, Colombia is not bound to surrender him in the event of such surrender being requested by Peru?

(c) Or is Colombia bound to surrender Haya de la Torre even if Peru does not demand his surrender?

Peru submitted that Colombia's application for an interpretation of the judgment was not admissible and that there was no dispute as to its meaning or scope as required by article 60 of the Statute. Peru further drew attention to the fact that Colombia's application had been submitted only a few hours after the delivery of the judgment, thus proving clearly that the judgment had not been properly examined by Colombia when she made her application to the Court.

The Court, by twelve votes to one, accepted Peru's submission and held Colombia's request for interpretation of the judgment to be inadmissible [60]). It pointed out that there could be no "dispute" as to the meaning or scope of a judgment where one Party, as did Peru in the present case, considered the judgment to be perfectly clear. Accordingly, the Court took the view that the requirements of article 60 of the Statute and article 79 (2) of the Rules had not been satisfied, and that it was not for the Court to adjudicate upon matters which had not been put before it in the proceedings resulting in the first judgment. There the matter rested until January 3rd, 1951, when Colombia instituted the third set of proceedings against Peru.

3. THE THIRD JUDGMENT OF THE COURT IN THE ASYLUM CASE [61])

In her application Colombia asked the Court to determine the manner in which effect was to be given to the first judgment of the Court, and to decide whether Colombia "in execution of the first judgment" was bound to deliver Haya de la Torre to the Peruvian authorities. The decision of the Court on the latter question was requested both on the basis of the first judgment, and in the alternative, on the basis of the "exercise of the ordinary competence" of the Court. Peru, on her part, merely asked the Court to determine the manner in which the judgment was to be executed by Colombia, without requesting a decision to determine her own conduct [62]).

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[60]) Cf. I. C. J. Reports 1950, p. 404. The Court consisted of only thirteen judges on this occasion, two of these being judges ad hoc chosen by Colombia and Peru, respectively. Judge Caicedo Castilla, Colombian judge ad hoc, dissented from the judgment of the Court. He did not, however, deliver a dissenting judgment of his own.

[61]) This is Case No. 14 in the Court's List; I. C. J. Reports 1951, p. 71 et seq.

[62]) This limitation of Peru's submission caused Colombia later to amplify her original

She further asked for Colombia's second submission to be dismissed, and alternatively for a declaration that the asylum ought to have ceased on November 20th, 1950, viz. the date on which the first judgment had been delivered, "in order that Peruvian justice may resume its normal course which has been suspended".

In the course of the proceedings the Court admitted the intervention of C u b a, in pursuance of article 63 of the Statute, and held that, as Cuba was a signatory of the Havana Convention, she was entitled to intervene in that part of the proceedings which concerned the question whether Colombia was under an obligation to deliver Haya de la Torre to the Peruvian authorities. The Court overruled Peru's objection to the admissibility of Cuba's intervention on the ground that the intervention was concerned with an issue not previously before the Court and could not therefore be regarded, as had been contended by Peru, as "an attempt by a third State to appeal against a judgment already delivered".

The Court, in its judgment of June 13th, 1951, refused to accede to the request of the Parties "to state the manner in which the judgment of November 20th, 1950, was to be executed". This, in the view of the Court, was a question of political expediency outside the province of judicial competence. Nor did the Court feel justified in adjudicating upon Colombia's second submission, viz. whether she was under an obligation, "in execution of the said judgment", to deliver Haya de la Torre to the Peruvian authorities. Here, the Court took the strictly legalistic view that, as this particular question had not been submitted to the Court in the course of the original proceedings and had consequently not figured in the first judgment, it was impossible to determine it in relation to the "execution of the said judgment". The Court's *"non-liquet"* on this issue, however, was less serious than might appear at first sight, because Colombia's alternative submission to the Court to decide this question "in the exercise of its ordinary competence" enabled the Court to deal with it. On this alternative submission the Court held by thirteen votes to one that Colombia was under no obligation to surrender Haya de la Torre to the Peruvian authorities[63]). On the other hand, and with regard to Peru's submission that the asylum ought to have ceased not later than on the date of delivery of the first judgment, the Court held that this submission should be upheld, without, however, the additional request that the asylum should have ceased "in order that Peruvian justice

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submission "expressis verbis" by requesting the Court to determine the manner in which both Parties were to execute the judgment: I. C. J. Reports 1951, p. 76.

[63]) Loc. cit., p. 83. The dissenting judge was the Peruvian judge ad hoc.

may resume its normal course" [64]). In this additional request the Court saw a veiled demand for the surrender of Haya de la Torre to which it was not prepared to accede.

Thus, as a result of this judgment, the legal position of Haya de la Torre remained in suspense, as it had done before: while on the one hand, his surrender could not be demanded by Peru, Colombia, on the other hand, was not entitled to maintain the asylum. The Court was aware of this contradiction, but pointed out that surrender was not the only means of terminating asylum [65]). It expressed the hope that the Parties would find a satisfactory solution of this seemingly intractable problem by friendly negotiation.

It cannot be denied that, however unexceptionable in law the judgment may be, it fails to satisfy the practical requirements of a final adjudication of the dispute between the Parties. It is also important to remember that asylum as an institution plays an important part in Latin American political life and that, if the Court had been enabled to approach the dispute in a less legalistic manner, valuable guidance for the future might have been given to Latin American statesmen. Whatever views one might take on this aspect of the case, one may hope that it will encourage States, in suitable cases, to submit their disputes to the Court in accordance with article 38 (2) of the Statute. The composition of the tribunal is such, having regard to the judicial representation of the geographical regions of the world, that governments could confidently entrust it with the settlement of disputes "*ex aequo et bono*" in cases of this kind.

III. Contentious Cases Pending Before the Court

Reference has already been made to cases which were pending before the Court and which had not been finally determined by the end of 1950 [66]). Of these, the first is the *Anglo-Norwegian Fisheries Case* instituted by an application filed by Great Britain on September 28th, 1949 [67]). The right claimed by Norway of reserving fishing grounds in the vicinity of the Norwegian coastline to Norwegian fishermen had long been contested by Great Britain, and Norway's method of defining the base lines from which she claimed she was entitled to measure the limits of her maritime belt had been

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[64]) This decision was arrived at unanimously and included the vote of the judge ad hoc chosen by Peru.

[65]) I. C. J. Reports 1951, at p. 82.

[66]) Cf. supra, at p. 2.

[67]) This is Case No. 5 in the Court's List. Cf. I. C. J. Reports 1949, at p. 233 et seq., and 1950, at pp. 62, 263 et seq., respectively.

the subject of negotiation between the two countries for many years. The ultimate cause of the dispute, however, which was submitted to the International Court in 1949, was a Royal Norwegian Decree passed in 1935 which defined these claims by statute, and it was as a result of this Decree that Great Britain instituted proceedings against Norway. It is not expected that the Court will give its decision before the end of this year. This decision is eagerly awaited not only by the Parties themselves, but by a number of other countries whose fishermen depend for part of their livelihood on fishing in Norwegian waters.

The *Case Concerning the Protection of French Nationals and Protected Persons in Egypt* which was commenced by France by an application filed on October 13th, 1949, was discontinued by mutual agreement between France and Egypt and was accordingly removed from the Court's list on March 29th, 1950, France having intimated that she was satisfied with the measures which had meanwhile been taken by the Egyptian government, and which she considered to be adequate protection of the interests of French citizens and protected persons [68]).

In addition to the *Anglo-Norwegian Fisheries Case* there was one other contentious proceeding pending before the Court at the end of 1950. This case, the *Case Concerning Rights of Nationals of the United States of America in Morocco,* was instituted by France against the United States of America by an application filed on October 28th, 1950, as a result of a claim by the United States Government that United States citizens should be granted preferential treatment in the Shereefian Empire [69]). At the time of writing this case has not gone beyond the stage of the written proceedings [70]).

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[68]) This had been Case No. 6 in the Court's List. For the relevant order of the Court see I. C. J. Reports 1950, p. 59.

[69]) Cf. I. C. J. Reports 1950, p. 391 et seq. This is Case No. 11 in the Court's List.

[70]) Attention may also be drawn to attempts to submit the dispute between Great Britain and Guatemala concerning the status of British Honduras to the jurisdiction of the Court. These attempts failed owing to the inability of the Parties to reach agreement on the nature of the projected proceedings: when Guatemala had, in September 1945, amended her Constitution so as to declare British Honduras to be part of the territory of Guatemala, Great Britain had countered that move by declaring her willingness to submit the dispute, which she contended to be essentially legal in character, to the jurisdiction of the Court in accordance with article 36 (2) of the Statute. Guatemala, on the other hand, requested the British Government to agree to the Court's deciding the matter "*ex aequo et bono*", in accordance with article 38 (2) of the Statute. This Great Britain was not prepared to do, and accordingly the project of submitting the dispute to the Court had to be abandoned altogether. A useful summary of the contentions of the two governments can be found in International Law Quarterly, vol. 2 (1948), at pp. 53–57. See also Cmd. 8206, which contains a renewal of Great Britain's declaration, and Manley O. Hudson, The Twenty-Sixth Year of the World Court, in American Journal of International Law, vol. 42 (1948), p. 8 et seq.

B. Advisory Opinions

The six advisory opinions with which the Court has been concerned were all submitted by the General Assembly of the United Nations, and it is not unlikely that the advisory jurisdiction of the Court will in time exceed its contentious jurisdiction both in volume and importance. Opinions differ on whether or not an extension of the work of the Court in this direction is desirable, particularly in view of the traditional distinction which the Statute draws between political and legal questions, and which will always require a preliminary examination of the problem whether or not any particular request is concerned with predominantly political or legal issues [71]). The Court must be on its guard not to give advisory opinions on issues which in substance are political disputes between contending Parties, and any deviation from a strict observance of this principle would undoubtedly be detrimental to the prestige of the Court as an independent arbiter and counsellor within the framework of the Charter and the Statute. That the Court has been most meticulous in observing this restraint is apparent from its opinions, which, in some cases at least, it is submitted, reflect an over-cautious attitude on the part of some of the judges.

I. Conditions of Admission of States to Membership ins the United Nation

The first request for an advisory opinion which was submitted by the Secretary-General of the United Nations on the instructions of the General Assembly was concerned with the question of whether a Member of the United Nations when pronouncing itself on the admission of a new Member in pursuance of article 4 of the Charter is entitled to make its consent dependent on conditions not expressly provided by article 4 (1), and in particular whether an affirmative vote can be made subject to the condition that other States be admitted to membership together with the State whose candidature is in question [72]). The request for the advisory opinion of the Court was

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[71]) Judge A l v a r e z takes the view that one of the most important tasks of the Court is its advisory jurisdiction on legal issues concerning the constitutional interpretation of the Charter (I. C. J. Reports 1947–1948, p. 67), while, at least with regard to bodies other than the United Nations which may, under article 65 of the Statute, be authorised to request advisory opinions from the Court, Manley O. H u d s o n takes the view that "it would be most unfortunate if the Court came to be looked upon as a general legal adviser to the various bodies which now have competence to request opinions, or if these bodies failed to take into account the judicial limitations, which the Court should not relax in its advisory procedure": American Journal of International Law, vol. 42 (1948), at p. 15.

[72]) This case which is entitled "Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)" is Case No. 3 in the Court's List: I. C. J. Reports 1947–1948, p. 57 et seq.

submitted as a result of the insistence of the Soviet Union that she would be prepared to vote for the admission of Italy only on condition that Bulgaria, Hungary, Rumania and Finland were admitted to membership at the same time as Italy [73]). Other attempts had been made earlier to link the admission to membership of one State to a demand that other States be admitted simultaneously, and it appeared imperative, therefore, to obtain an authoritative interpretation of article 4 of the Charter.

In order to make fully intelligible the opinion of the Court it is necessary to set out the exact terms of the request. These were as follows:

> "Is a Member of the United Nations which is called upon, in virtue of article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?"

The Court in its majority opinion [74]), expressed the view that it could not concern itself with the mental process which may influence a Member's vote, and that the question as framed should be confined to whether or not a vote may be accompanied by statements showing that it is made dependent on certain conditions. Reduced in this way, and in its simplest form, the question then resolved itself into whether or not the conditions for membership set out in article 4 of the Charter were exhaustive in character. The Court considered this to be a legal question which it was entitled to consider in accordance with article 65 (1) of the Statute [75]).

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[73]) See I. C. J. Reports 1947–1948, at p. 114 (Dissenting opinion of Judge Krylov); also Günther Jaenicke: Die Aufnahme neuer Mitglieder in die Organisation der Vereinten Nationen, in Z. ausl. öff. R. u. VR., vol. XIII (1950), pp. 291–380, at p. 324, who deals fully with the history of the problem and also with the two judgments of the International Court on the interpretation of article 4 of the Charter; further see P. O. Humber: Admission to the United Nations, in British Year Book of International Law, vol. XXIV (1947), pp. 90–115, an article written before the opinions of the Court were delivered. Also: Georges Berlia: Admission aux Nations Unies, in Revue Générale de Droit International Public, vol. 53 (1949), pp. 481–502.

[74]) Judges Guerrero, Alvarez, Fabela, Hackworth, de Visscher, Klaestad, Badawi Pasha, Hsu Mo and Azevedo. Judges Alvarez and Azevedo delivered individual opinions.

[75]) It had also been contended that the Court was not competent to consider a request which was concerned with the interpretation of the Charter. This contention was so clearly untenable that the Court had no difficulty in disposing of it quite shortly: I. C. J. Reports 1947–1948, p. 61. Judge Alvarez, in his individual opinion, expressed the view that

On the merits it was held that article 4 (1) was so clearly worded that the conditions there stated had to be regarded not only as the conditions which were necessary, but also as the conditions which must suffice. On the other hand, as article 4 (1) leaves the matter to the judgment of the Organisation, viz. of the Members of which it is composed, a candidate State, even if it fulfils all the conditions enumerated in article 4 (1), is not entitled as of right to be admitted to membership. Whether or not admission is finally accorded, may depend on political considerations which any Member voting in accordance with article 4 is entitled to take into account. This was so held in the majority opinion, and it would seem to be unexceptionable. But then the Court proceeded to make a distinction between conditions which are connected with those set out in article 4 and others which are "extraneous" to those there enumerated[76]). From this distinction the Court concluded that "extraneous" conditions such as a demand that other States be admitted to membership together with States whose candidature is the subject of the vote cannot be imposed. Accordingly, the Court, by nine votes to six, answered both the main question and the subsidiary question in the negative[77]).

Judge Alvarez, while concurring in the majority opinion of the Court, qualified his answer by saying that there may be exceptional cases in which an affirmative vote may be made subject to the condition that other States be also admitted to membership. In his view, this was permissible where two States had been brought into existence simultaneously as a result of the disappearance of a single State of which they had formed part[78]).

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the traditional distinction between legal and political questions had been profoundly modified by modern developments, and that there are no longer any "strictly legal" issues, although he conceded that it was still necessary for the Court to differentiate between "predominantly legal" and "predominantly political" questions. The question before the Court he considered to belong to the former category: Loc. cit., pp. 69–70.

[76]) I.C.J. Reports 1947–1948, pp. 63–64.

[77]) Loc. cit., at p. 65. L. C. Green, Admission of a State to the United Nations, in Modern Law Review vol. 11 (1948), p. 487, has rightly pointed out that, in order to comply with the advisory opinion of the Court, a State may, during the early debates, attach any condition it likes, and that it is only at a later stage that conditions attached to its vote must be confined to matters not "extraneous" to the requirements of article 4. While it is true, as Mr. Green states, that the advisory opinion will not, in practice, make any difference to the practice of the United Nations with regard to the admission of members, it must not be forgotten, that it had eminently practical results in the case under review, as is evident from the fact that Italy is still not a member of the United Nations.

[78]) Cf. I.C.J. Reports 1947–1948, p. 72. Judge Alvarez probably had India and Pakistan in mind. While it may be conceded that in cases of this kind it would be highly desirable to proceed to simultaneous admission, there is no authority in law to justify this view, quite apart from the fact that it is conceivable that one of the new States fulfils the conditions enumerated in article 4, while the other does not.

The joint dissenting opinion of Judges Basdevant, Winiarski, McNair and Read concurred in the view that the Court was competent to deal with the questions which had been submitted, but dissented from the answers given to these questions by the majority. The dissenting judges were of opinion that it would not be right to allow States to invoke certain conditions in the course of the early stages of the proceedings and then to forbid them to invoke the same conditions in the course of the debate preceding admission. Accordingly, a State ought to be allowed to give the same reasons in support of a refusal to vote for the admission of a new Member as it may have given in the course of the general discussion. The dissenting opinion then proceeded to give its reasons why conditions which the majority of the Court had qualified as being "extraneous" to the conditions enumerated in article 4 (1) of the Charter may be attached to an affirmative vote. The language of article 4 (1) was said to be permissive in character in that it referred to "membership being open", while the French text contained the words "*peuvent devenir Membres ...*", a clear indication that the matter had been left to the discretion of the Security Council and the General Assembly as well as to the member States constituting these bodies.

The history of article 4 was considered as supporting this interpretation [79]). The four judges deemed it necessary, however, to point out that, where a Member makes its affirmative vote subject to political considerations outside the ambit of the conditions enumerated in article 4 (1), it must act in good faith as provided in article 2 (2) of the Charter. Accordingly, the joint dissenting opinion answered both questions in the affirmative, subject only to the qualification that the right to make an affirmative vote dependent on "extraneous" political considerations must be exercised in good faith [80]).

Judges Zoričić and Krylov delivered separate dissenting opinions. With regard to the competence of the Court to give an advisory opinion on the two questions submitted for its decision, Judge Zoričić was emphatic in denying the Court's competence, while Judge Krylov took the more lenient view that "it would be better if the Court were to assert its right not to answer the question ...." [81]). Both judges agreed that the question was political rather than legal in character and that the Court was therefore precluded from answering it. Judge Zoričić seemed to base this view of the Court's lack of competence not so much on the fact that article 65 of the Statute limits the advisory jurisdiction of the Court to legal questions (thus

[79]) Loc. cit., pp. 87–90.
[80]) Ibid., at pp. 92 and 93.
[81]) Cf. loc. cit., at pp. 95 and 109, respectively.

excluding political questions from its competence) as on the argument that the language of article 65 is permissive rather than obligatory in character even as far as legal questions are concerned, and that, having regard to the words "the Court may give ....", it was open to the Court to refuse an advisory opinion regardless of whether a particular question was legal or political in character [82]). On the merits of the question Judges Zoričič and Krylov agreed that an affirmative vote can be made dependent on conditions not expressly provided by article 4 (1) of the Charter, and in particular on a condition that other States be admitted to membership at the same time [83]). Both judges also agreed that the right to stipulate such conditions must be exercised in good faith in accordance with article 2 (2) of the Charter.

It is more than doubtful whether in practice this advisory opinion will be of any great importance. The legal approach to the problem must not blind us to the fact that, whatever view we may take of the legal nature of votes on the admission of new Members, such votes are apt to be coloured by political considerations of the first importance, and we may well agree with Judge Krylov when he says that in practice only three courses are open to Members: "A vote may be affirmative or negative; or a Member may also abstain from voting. But a conditional vote is meaningless in law" [84]).

II. Competence of the General Assembly for the Admission of a State to the United Nations

The opinion of the Court on whether the General Assembly is entitled to effect the admission of a State to membership in the United Nations without the prior recommendation of the Security Council is of far greater importance than the previous opinion. It is concerned with a problem which goes to the roots of the legal structure of the Organisation [85]), and the opinion of the Court cannot fail to exercise a profound influence upon the manner in which the respective rights of the Security Council and the General Assembly are to be exercised. It is interesting to observe that, although this question

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[82]) Cf. loc. cit., pp. 94–95. It is submitted that this interpretation of article 65 (1) of the Statute is too artificial to be convincing, and that the real purpose of this provision is to enable the Court to exercise jurisdiction in one class of case while excluding another class of case from its competence. Neither municipal courts nor international tribunals are entitled, once they have decided in favour of their own competence, to shelter behind a 'non-liquet'.

[83]) Ibid., pp. 106 and 115.

[84]) Loc. cit., at p. 114.

[85]) This is Case No. 9 in the Court's List; see I. C. J. Reports 1950, pp. 4–34.

was submitted to the Court more than two years later than the question concerning the interpretation of article 4 (1) of the Charter, and about eighteen months later than the date on which the first opinion was actually delivered by the Court, there are clear indications in the earlier opinion of the views taken by the judges on the interpretation to be given to the procedural provision of article 4 (2), although, of course, the views so expressed in the earlier opinion were only '*obiter dicta*' then [86]).

The question as submitted to the Court was framed in the following terms:

> "Can the admission of a State to membership in the United Nations pursuant to article 4 (2) of the Charter be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend?"

Before proceeding to consider the merits of the question the Court, as in the previous case, again had to deal with objections to its own competence to deal with matters concerning the interpretation of the Charter. These objections were overruled unanimously, for the same reasons as previously [87]). On the merits the Court approached the problem in such as way as not to differentiate between the absence of a recommendation resulting from an insufficient number of positive votes and the absence of a recommendation resulting from the casting of one or more negative votes in the Security Council. This approach resulted in the Court merely having to deal with the non-existence of a recommendation. Judge Azevedo, in his dissenting opinion, adopted a different approach, and by differentiating between the two he arrived at different conclusions from the majority of the Court with regard to the latter part of the question as submitted by the General Assembly [88]).

The majority of the Court, having narrowed the issue in the way described, had little difficulty in answering the whole question in the negative. The wording of article 4 (2) of the Charter, in the view of the majority, precluded any other interpretation, and the Court pointed out that, having regard to the word "upon" which preceded the word "recommendation" in the latter part of article 4 (2), it was clear that the recommendation must be regarded as a condition precedent to the decision of the General Assembly [89]). Further, in the opinion of the majority, the general structure of the Charter

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[86]) Case No. 3 was submitted to the Court in November, 1947, and the opinion of the Court in that case was delivered on May 28th, 1948; Case No. 9 was submitted in November, 1949, and the opinion was delivered on March 3rd, 1950.

[87]) See I. C. J. Reports 1950, at p. 6.

[88]) as to this, see infra.

[89]) I. C. J. Reports 1950, at p. 8.

and the fact that the Security Council could not be regarded as being in a position inferior to that of the General Assembly, lent support to the literal interpretation of article 4 (2) which had been adopted. Accordingly, the Court, by a majority of twelve votes to two, held that the General Assembly has no power to effect the admission of a Member without the prior recommendation of the Security Council, regardless of whether the candidate State has failed to obtain the requisite number of votes or whether one of the permanent Members has cast a negative vote [90]).

Judges A l v a r e z and A z e v e d o delivered dissenting opinions. The former laid down certain rules of interpretation which he qualified as "the new system of interpretation". This system, in his view, required that different methods of interpretation be applied to different kinds of treaties: that the texts of treaties be not followed slavishly, that, generally speaking, the *«travaux préparatoires»* be ignored in the interpretation of treaties, and that methods of interpretation be modified from time to time in the light of changes taking place with regard to the matters to which they relate [91]). Basing his decision on these premises Judge A l v a r e z arrived at the conclusion that, although the General Assembly was not entitled to admit a State to membership without the prior recommendation of the Security Council, it was entitled to subject the veto of a permanent Member to an independent examination, and if it arrived at the conclusion that the veto had not been kept within proper limits, viz. that there had been an abuse of the right of veto, it had power to effect the admission of a new Member of its own accord [92]).

Judge A z e v e d o adopted a similar approach, without, however, postulating an entirely new system of interpretation. On the first part of the question he, like Judge Alvarez, concurred in the opinion of the majority of the Court, viz. he agreed that where there was no recommendation at all, the General Assembly was not entitled to act [93]). On the second part of the question, after considering the views propounded at San Francisco, he came to the conclusion that the word "decisions" in article 27 of the Charter could not be interpreted as extending to the word "recommendation" contained in article 4 (2), and that, consequently, no State was entitled to veto a recommendation under article 4 (2). In the alternative he held that, even if this interpretation were not accepted, the question of admission of new Members

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[90]) Loc. cit., at p. 10.

[91]) See in particular loc. cit., pp. 16–18.

[92]) Loc. cit., at p. 20. As to this, see also J a e n i c k e, in Z. ausl. öff. R. u. VR., at p. 377.

[93]) I. C. J. Reports 1950, at p. 23.

would be one of procedure with regard to which, in accordance with article 27 (2), a permament Member was not entitled to exercise a right of veto. In the result Judge Azevedo held that the absence of seven favourable votes in the Security Council was fatal to an application for membership but that, where seven favourable votes had been cast, the General Assembly was free to either accept or reject the application even if one of the permanent Members had cast a negative vote [94]).

The dissenting opinions of Judge Alvarez and Azevedo would appear to leave to the General Assembly more discretionary power than it was intended to possess, or indeed, than it was expressly given by the clear wording of article 4 (2). Moreover, whether one prefers the solution of Judge Alvarez which adopts as a criterion the "proper limit" of the veto, or the solution of Judge Azevedo which, while excluding the veto altogether from the ambit of the voting procedure under article 4 (2) and then leaving it to the discretion of the General Assembly whether or not to accept a candidate for admission, both solutions would lead to a multiplication of disputes. Such disputes, it is thought, would not fall within the competence of the Court, nor would it be desirable that they should [95]).

III. Reparation for Injuries Suffered in the Service of the United Nations

The third in the series of cases concerning the constitutional structure of the United Nations Organisation related to the problem of the capacity of the Organisation to bring international claims against States [96]). Following upon the murder by terrorists of Count Folke Bernadotte who, at the time of his death, was performing duties in Palestine on behalf of the United Nations, the General Assembly submitted the following questions to the Court for an advisory opinion [97]):

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[94]) Loc. cit., at p. 34.

[95]) The view expressed by Jaenicke (loc. cit., p. 379) that the joint dissenting opinion in Case No. 3 (I. C. J. Reports 1947–1948, p. 93) favours an extension of the Court's competence so as to empower it to adjudicate upon the question of whether or not a veto has been properly exercised cannot be shared. The dissenting opinion refrained from expressing a view either way, and it is unlikely that the Court, in view of the strict observance it has so far displayed with regard to the limits of its own competence, would consider itself competent to deal with a question which from its very nature is, if nothing more, certainly "predominantly political" in character.

[96]) This is Case No. 4 in the Court's List; it was submitted to the Court on December 7th. 1948, and is entitled "*Reparation for Injuries suffered in the Service of the United Nations*". The advisory opinion of the Court will be found in I. C. J. Reports 1949, at pp. 174–219.

[97]) Quincy Wright: Responsibility for Injuries to United Nations Officials, in American Journal of International Law, vol. 43 (1949), p. 95 et seq. gives an account of previous assassinations of high-ranking officials in foreign countries, both before and after

"I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organisation, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?

II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

(a) The first question fell to be considered, both as regards claims in respect of damage caused to the Organisation and in respect of damage caused to the victim, under two aspects, viz. (i) where the defendant State was a Member of the United Nations, and (ii) where the defendant State was not a member of the United Nations. The Court defined "capacity to bring international claims" as the capacity to resort to the methods which are normally employed by one State against another in connection with the presentation and settlement of claims. Without the attribute of international personality such capacity cannot exist, and it was therefore necessary for the Court to enquire whether the Organisation possessed such personality. The Charter, in the opinion of the Court, contained numerous provisions which indicated clearly that this was the case: the right of the Organisation to demand every assistance from Members in any action taken in accordance with the Charter (article 2 [6]); the right to demand that decisions of the Security Council be carried out by Member States (article 25), and many others. The Court, accordingly, reached the unanimous conclusion that the Organisation is an international person[98]). Having reached that conclusion, the Court inferred the capacity to bring international claims from the presumed intention of Member States to confer upon the Organisation the power to discharge effectively all those functions which, "if they were to require the concurrent action of fifty-eight or more Foreign Offices, could not be effectively discharged"[99]). With specific reference to the question whether the United Nations can bring such claims for damage caused to the

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the establishment of the United Nations. Count Bernadotte, at the time of his death, was acting as United Nations mediator in the Palestine dispute. He was accompanied by Colonel André P. Serot, a United Nations observer, who was murdered on the same day, September 17th, 1948.

98) I. C. J. Reports 1949, at pp. 179 and 187.

99) Loc. cit., at p. 180. Judge Hackworth, although he dissented on other matters, reached the same conclusion on this point. In his view, however, this result followed from the provisions of articles 104 and 105 of the Charter and from the Convention on Privileges and Immunities, of February 13th, 1946: loc. cit., at pp. 196–197.

Organisation itself (Question I [a]), the Court reached the unanimous conclusion that it could and accordingly answered this question in the affirmative, regardless of whether the defendant State was or was not a Member of the United Nations[100]).

(b) With regard to Question I (b), viz. whether international claims could be brought by the Organisation for damage caused to the victim, the Court pointed out that the Charter did not expressly confer power upon the Organisation to include such damage in a claim for reparation, but that such power arose by necessary implication from the fact that it was essential in order to enable the Organisation to perform its duties[101]). The Court, accordingly, by eleven votes to four, answered Question I (b) in the affirmative[102]).

Judges Hackworth, Winiarski, Badawi Pasha and Krylov dissented from the majority opinion, Judge Winiarski associating himself with the views expressed by Judge Hackworth. The latter stated that all powers vested in the Organisation are delegated and enumerated powers, and that, consequently, those powers which States intended to confer upon and delegate to the Organisation, could not be presumed to have been so delegated unless the Charter contained express provisions to that effect. The Charter did not, in Judge Hackworth's view, contain such express provisions, nor could it be said that, as far as the performance of the duties of an agent of the Organisation was concerned, there must be substituted for the bond of allegiance towards the agent's own country a bond of allegiance towards the Organisation. Judge Hackworth thus took his stand upon the traditional rule of international law that claims for the benefit of an individual should be made through the government of the State of which the individual is a national, and by going through normal diplomatic channels. This view loses sight of the fact that agents who perform duties for the Organisation may be stateless persons or persons who possess the nationality of the defendant State[103]). If the traditional method were adopted to the exclusion of what the majority of the Court considered to be the principle arising by intendment from the Charter, such persons would be deprived of the means of pursuing legitimate claims[104]).

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100) Loc. cit., at pp. 181, 185 and 187.

101) "To ensure the independence of the agent, and consequently, the independent action of the Organisation itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organisation": ibid., at p. 183.

102) I. C. J. Reports 1949, p. 187.

103) Judge Alvarez, in his individual opinion, drew attention to this difficulty: loc. cit., p. 191.

104) Judge Badawi Pasha was aware of the difficulty, but his solution would

(c) Question II had rightly anticipated the conflict which might arise between rights asserted by the United Nations and rights possessed by the State of which the victim is a national [105]). The Court did not feel called upon to give any guidance as to how such a conflict might be resolved. It merely stated that it "saw no reason why the parties concerned should not find solutions inspired by goodwill and commonsense . . ." [106]). The Court, by ten votes to five, answered Question II in the following terms:

> "When the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself; respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess, and thus bring about a reconciliation between their claims; moreover this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States, either generally or in each case" [107]).

It may be added that, in the view of the majority of the Court, the answer to Question II applied also to cases in which the victim was a national of the defendant State.

The majority view of the Court, which disregards the bond of nationality where performance of duties on behalf of the United Nations is concerned, is more consonant with the objects and principles of the United Nations. The traditional approach of the dissenting judges deprives individual claimants of a remedy which would give them rights commensurate with the duties they have to perform; it also forces them to comply with all the traditional requirements implicit in the old method of preferring claims through diplomatic channels, and in particular with the requirement that, before such claims can be preferred, the claimant must show that he has exhausted "domestic remedies" [108]).

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appear to be wholly impracticable. He suggested that "there was nothing to prevent .... agents .... from entering into contracts for reparation due to them in the event of injury sustained in the performance of their duties ....": loc. cit., p. 216.

[105]) Question II did not arise as far as the dissenting opinions were concerned, the four dissenting judges having reached the conclusion that only States, and not the Organisation, are entitled to make claims for the benefit of individuals.

[106]) I. C. J. Reports 1949, p. 186.

[107]) Loc. cit., p. 188. The fifth dissenting vote (in addition to the four dissenting opinions) would seem to be that of Judge A z e v e d o who held that the Organisation has priority over States in making claims on behalf of officials appointed directly by the Organisation: ibid., p. 195.

[108]) Judge A z e v e d o pointed this out in his individual opinion: loc. cit., p. 195.

IV. Procedural Questions Relating to the Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania

When the Peace Treaties with Bulgaria, Hungary and Rumania were signed in 1947 identical clauses were inserted in all three treaties providing for the observance of human rights and fundamental freedoms by the three signatories[109]). As a result of suspicions voiced by Great Britain, Australia, Canada, New Zealand and the United States of America that the three countries had failed to carry out their obligations under these clauses of the respective treaties, the matter became the subject of discussion before the General Assembly, and on April 30th, 1949, the latter resolved to submit certain questions to the Court. These questions were not concerned with the substance of the accusations which had been made against the three countries, but only with the procedure to be observed, in accordance with the treaties, by the signatories in attempts to solve disputes of this kind. It is important to bear this limitation in mind in order to appreciate the true significance of the advisory opinion. The opinion did not, and could not, concern itself with the true merits of the case, and it judiciously refrained, as it was bound to do, from passing judgment on the behaviour of the three States.

The four questions which were submitted to the Court by a request filed on November 3rd, 1949, may be summarised as follows[110]):

I. Whether the diplomatic exchanges between the Allied Powers and the three countries disclosed disputes to which the provisions of the treaties for the settlement of disputes applied[111]);

II. whether the three countries were obliged to carry out these provisions,

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[109]) Article 2 of the Bulgarian Treaty, article 2 (1) of the Hungarian Treaty, and article 3 (1) of the Rumanian Treaty provide as follows: "Bulgaria (Hungaria, Rumania) shall take all measures necessary to secure to all persons under Bulgarian (Hungarian, Rumanian) jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting."

[110]) This is Case No. 8 in the Court's List. The four questions are fully set out in I. C. J. Reports 1950, on pp. 67 and 68.

[111]) The provisions referred to are those contained in article 36 of the Bulgarian Treaty, article 40 of the Hungarian Treaty and article 38 of the Rumanian Treaty. As far as is material, these articles provide that disputes not resolved by the Heads of Missions shall "be referred at the request of either Party to the dispute to a Comission composed of one representative of each Party and a third member selected by mutual agreement of the two Parties from nationals of a third country". Further: "Should the two Parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either Party to make the appointment": Cf. I. C. J. Reports 1950, at p. 73.

including those for the appointment of their own representatives to the Treaty Commissions[112]);

III. whether, if one Party failed to appoint a representative, the Secretary-General of the United Nations was entitled to appoint the third member upon the request of the other Party;

IV. whether a Commission composed of the representative of one Party only and of a third member appointed by the Secretary-General would constitute a Commission within the meaning of the relevant provision of the treaty.

Having regard to the sequence of these four questions, only questions I and II fell to be answered by the Court. Questions III and IV could not arise until it became known whether, assuming the answers to questions I and II to be in the affirmative, the three countries would appoint their own representatives in accordance with the relevant provisions of the respective treaties[113]). The case, therefore, logically fell into two parts which, for the sake of convenience, may be referred to as the first phase and the second phase.

1. THE FIRST PHASE

(a) Bulgaria, Hungaria and Rumania contested the competence of the Court on the ground that an adjudication by the Court would amount to an "intervention in matters essentially within their domestic jurisdiction", in violation of article 2 (7) of the Charter. This objection was obviously misconceived as the Court was not concerned with the substantive question of whether or not the three countries had failed to observe human rights, but only with the procedural question arising under the relevant articles of the treaties.

Of far greater importance was the second objection which denied the competence of the Court to consider the request on the ground that, as the three countries had not given their consent to the proceedings, the Court was not entitled to assume jurisdiction. It was an objection which raised in its entirety the difficult question as to when a request for an advisory opinion ought to be allowed and when it ought to be refused as being a contentious case "in disguise".

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112) There followed a subsidiary question which will be referred to later.

113) In accordance with article 36 of the Bulgarian Treaty and the identical provisions of the other treaties, the Secretary-General may appoint the third member of the Commission if the Parties fail to agree within a period of one month.

The Court, by a majority, overruled the objection and held itself to be competent to deal with the request which had been submitted[114]). Some of the reasons given by the Court in support of this view are not, it is submitted, altogether satisfactory. One of them was that, as an advisory opinion could not be said to have binding force, there was no substance in the complaint that lack of consent on the part of the three States would force a decision upon them against their will. This argument would appear to be too legalistic; the moral force of advisory opinions, like that of judgments, is such that their non-observance ought not to be anticipated. Equally legalistic was the argument that the advisory opinion in this case had been requested by the General Assembly and not by the States concerned, and would therefore be given to the former and not to the latter. This may be so, but it would be idle to deny that, once given, an advisory opinion is intended to be observed not only by the organ which has requested it, but also by the States immediately concerned[115]).

The Court was on firmer ground when it stated that the subject-matter of the request was not concerned with the substance of the dispute between the Parties, but only with procedural questions incidental to the merits, and that, therefore, it did not relate to a "dispute pending" between the Parties. In connection with this argument the Court had to address itself to the question whether the case concerning the *Status of Eastern Carelia*[116]) constituted a precedent in favour of upholding the objection to the competence of the Court. The majority of the Court held that the Eastern Carelia Case could be distinguished from the present case, and that the Court was accordingly not precluded from assuming jurisdiction[117]).

Judge A z e v e d o took a different view. He held the principles enunciated in the Eastern Carelia Case to be applicable to the present case and found nothing in subsequent developments from Dumbarton Oaks onwards to justify the view that the principles laid down in the Eastern Carelia Case had been modified in any way. The most important of these principles he con-

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114) Judge F a b e l a being absent, the Court was composed of only fourteen judges. Although only three judges (W i n i a r s k i, Z o r i č i ć and K r y l o v) delivered dissenting opinions, there were in effect four dissenting opinions on the preliminary objection to the jurisdiction of the Court, Judge A z e v e d o, in his separate opinion, also pronouncing himself in favour of the objection. In the report the majority is stated to have been one of eleven votes to three. The discrepancy is explained by the fact that Judge Azevedo, although he would have concurred in the actual answers to questions I and II, disagreed with the Court on the question of competence. His opinion, therefore, is presumably regarded as a "minority opinion".

115) See as to this also Judge W i n i a r s k i, in I. C. J. Reports 1950, at p. 97.

116) Cf. P. C. I. J., Advisory Opinion No. 5.

117) I. C. J. Reports 1950, p. 72.

sidered to be that contained in the following quotation from the opinion of the Permanent Court:

> "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" [118]).

There was, in Judge Azevedo's view, one further obstacle to the Court's assuming jurisdiction, viz. the impossibility of adequately investigating the facts in cases in which one Party (in the present case Bulgaria, Hungary and Rumania) has refused to take any part in the proceedings.

Judges Winiarski, Zoričić and Krylov shared this view and held the objection to the Court's jurisdiction to be well-founded. Judge Winiarski postulated that the Court should never depart from three principles: "*audiatur et altera pars*", the equality of States before the judge and the independence of States. He considered that if in the present case the Court were to give an opinion, it would violate these principles [119]). Judge Zoričić held it to be beyond doubt that the Court, if it assumed jurisdiction, would in fact be deciding the dispute between the Parties, and that the analogy between the present case and the Eastern Carelia Case was so striking that the Court was, on the authority of that case, precluded from considering the present request [120]). This was also the view adopted by Judge Krylov in his dissenting opinion [121]).

(b) Once the majority had pronounced itself in favour of the competence of the Court to consider the request, neither question I nor question II presented any difficulty. It was fairly obvious that there was in existence between the Parties a dispute concerning the implementation of the Peace Treaties, and it was equally obvious that this dispute was, having regard to article 36 of the Bulgarian Treaty (article 40 of the Hungarian Treaty and article 38 of the Rumanian Treaty), one which was subject to the method of settlement provided in the three treaties. The Court, therefore, by a majority of eleven votes to three, had no difficulty in answering question I in the affirmative [122]). On the facts, and with regard to question II, the

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[118]) Cf. loc. cit., at p. 81. See also P. C. I. J., Series E., No. 1 (1922–1925), at p. 203. In the Eastern Carelia Case four judges dissented from the majority opinion: Judges Weiss, Nyholm, de Bustamante and Altamira.

[119]) I. C. J. Reports 1950, at p. 95.

[120]) Loc. cit., p. 103.

[121]) Ibid., p. 109 et seq.

[122]) Loc. cit., at p. 75. Judge Azevedo, in his separate opinion, stated that, apart from the question of the Court's competence, he entirely agreed with the answers given by

Court was satisfied that the Parties had not arrived at a settlement of the dispute in accordance with article 36 (articles 40 and 38, respectively), and that, as the treaties provided that any dispute should be referred to a Commission "at the request of either Party", and as Bulgaria, Hungary and Rumania had not complied with the request of the Allied Powers, they had failed to carry out their obligations. The Court accordingly answered question II, by a majority of eleven votes to three, in the following terms:

> "The governments of Bulgaria, Hungary and Rumania are obligated to carry out the provisions of those articles referred to in question I which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions" [123]).

2. THE SECOND PHASE

Bulgaria, Hungary and Rumania took no action to comply with the advisory opinion of the Court concerning the first phase of the case, i. e. they refused to appoint their own representatives to the Treaty Commission as provided in articles 36, 40 and 38 of the relevant treaties. It therefore now became necessary for the Court to consider question III of the original request.

(a) This question was framed in the following terms:

> "If one Party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Rumania where that Party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other Party to a dispute according to the provisions of the respective Treaties?" [124]).

The relevant provisions of the three Treaties were precisely those usually met with in arbitration clauses, viz. each Party to appoint its own representative to a Commission and the third member to be selected by mutual agreement between the Parties, and in default of such agreement, by an

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the majority: loc. cit., p. 79. He considered the questions submitted to the Court to be "extremely simple", and "if one regarded them as abstract points, one would be amazed at their having been asked": ibid. p. 86.

[123]) Ibid., at p. 77.

[124]) Question IV could only arise in the event of an affirmative answer being given to question III. Question IV was as follows: – "Would a Treaty Commission composed of a representative of one Party and a third member appointed by the Secretary-General of the United Nations constitute a Commission within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?" As to this, see infra.

independent person. In the case under review that person was to be the Secretary-General of the United Nations who could "be requested by either Party to make the appointment". In its literal and ordinary meaning the term "third member" would appear to be capable of one meaning only: that the Commission must be one consisting of two members before a third member can be co-opted or otherwise selected. This, in fact, was the conclusion reached by the Court by a majority of eleven votes to two[125]). The Court, however, did not rely merely on a literal interpretation of the relevant treaty clauses, but also pointed out that a Commission composed of two members only would be unable to reach a decision except by a unanimous vote of the two members, and that such a result was not in accordance with the idea underlying the dispute clause which postulated a "decision of the majority of the members of the Commission ..." The Court was not unaware of the serious consequences which were bound to result from this decision, but it rightly refused to be swayed by extraneous considerations of this nature. It pointed out that "its duty was to interpret treaties, not to revise them" [126]).

Having held that the Secretary-General was not entitled to appoint the "third" member of the Commission, the majority of the Court was not called upon to consider question IV.

(b) Judges Read and Azevedo, on the other hand, reached the conclusion that both questions III and IV should be answered in the affirmative, viz. that the Secretary-General was entitled to appoint a third member of the Commission in spite of the negative attitude of Bulgaria, Hungary and Rumania, and with regard to question IV, that a Commission consisting of two members only, one of whom had been appointed by the Secretary-General, would be "competent to make a definitive and binding decision in settlement of the dispute".

Judge Read adopted the view that the relevant provisions of the Peace Treaties with Bulgaria, Hungary and Rumania had to be considered from the point of view of whether or not these countries ought to be allowed to frustrate the main purpose of the disputes clauses relating to the observance of human rights, by the simple device of adopting a wholly negative and uncooperative attitude. Viewed in this light, the answer to the question was bound to differ from that given by the majority of the Court. In support of

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[125]) I. C. J. Reports 1950, at p. 230. The dissenting opinions were those of Judges Read and Azevedo. On this occasion the Court was composed of only thirteen judges, Judges Zoričić and Fabela being absent.

[126]) Loc. cit., at p. 229.

his view Judge Read relied upon several opinions of the Permanent Court in which, as he expressed it, the Permanent Court had applied the "principle of effectiveness" [127]). Judge Read then examined the Bulgarian, Hungarian and Rumanian treaties in the light of this principle and arrived at the conclusion that their general tenor and structure demanded affirmative answers to both questions III and IV [128]). Having regard, however, to his own admission that the principle of effectiveness could be applied only in cases in which its application would not do violence to the terms of the relevant treaty provisions, i. e. in this case the term "third member" in articles 36, 40 and 38 of the treaties, it was necessary for him to interpret that term as meaning a neutral or disinterested member, and not a member in the chronological or numerical sense.

Judge Azevedo, in his dissenting opinion, after an exhaustive examination of other arbitration clauses contained in these treaties, arrived at the same final conclusion as Judge Read [129]).

The fact that the majority opinion of the Court left the fundamental problem of the observance of human rights by the Bulgarian, Hungarian and Rumanian governments unresolved is regrettable. This indecisive result, however, is not altogether surprising because the authors of the treaties, instead of anticipating a refusal of the three countries to take the necessary steps to implement the provisions relating to arbitration, took it for granted that this contingency would not arise. Such an assumption was fully justified in the light of experience because, wherever customary arbitration clauses in international instruments provide for the appointment by the Parties of their own representatives, the interests of the Parties themselves have always been assumed to demand the implementation of the respective duties of the Parties to proceed to the requisite appointment. That one of the Parties would neglect its own interest to the extent of refusing to co-operate in the appointment of its own representatives must have seemed so unlikely as not to merit serious consideration, and in fact it was almost unprecedented in the history of diplomatic intercourse. This, it would seem, is the real reason why the opinion in this case, which was the first of its kind, could not fail to be inconclusive and unsatisfactory in practice.

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[127]) The cases mainly relied upon were the case of the *Mavrommatis Palestine Concessions*, the *Mosul Boundary Case*, the case of the *Factory of Chorzów*, the case of the *Interpretation of the Greco-Turkish Agreement* of December 1st, 1926, and the opinion concerning the *Acquisition of Polish Nationality*. None of these cases, however, can be said to be directly in point.

[128]) I. C. J. Reports 1950, pp. 246–247.

[129]) Loc. cit., at pp. 248 and 250.

V. The International Status of South-West Africa

On December 19th, 1949, the General Assembly submitted the following question to the Court [130]): –

> "What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:
> (a) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations?
> (b) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa?
> (c) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?"

The main question submitted to the Court (as distinct from questions [a] to [c] above) was framed in such wide terms that it would have enabled the Court to range over a very wide field. The Court, however, preferred to deal only with the individual questions as it considered that answers to these would be sufficient also to answer the main question [131]).

(a) The Court did not accept the contention of the Union of South Africa that, as the League had ceased to exist, the Mandate itself had come to an end simultaneously with the disappearance of the League. The Court was unanimous in rejecting this argument, and Judge M c N a i r in particular considered at length the contention that a Mandate in international law could be likened to a mandate in civil law, viz. to the legal relationship between principal and agent [132]). The majority of the Court relied mainly on the words "sacred trust of civilization" contained in article 22 of the League Covenant, and on the provisions relating to the machinery provided for the implementation of that trust. Judge M c N a i r appeared to favour the Anglo-Saxon approach by likening the mandate to the trust of Anglo-

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[130]) The request was filed on December 27th, 1949, and became Case No. 10 in the Court's list; see I. C. J. Reports 1950, p. 128 et seq.

[131]) See I. C. J. Reports 1950, at p. 131. Judges A l v a r e z , M c N a i r and R e a d , however, dealt extensively with the legal nature of mandates, and Judge M c N a i r's separate opinion, in particular, contains important observations on this aspect of the matter; see infra.

[132]) The different theories put forward by writers with regard to the legal nature of League of Nations Mandates in the inter-war period are too well-known to require consideration here. All that need be said is that the civil law approach contended for by the Union of South Africa in the present case has hardly found any adherents.

Saxon law [133]), as far as he considered an analogy to civil law to be applicable at all. What was important in his view was the fact that the Mandate had created a status for South-West Africa which was valid '*in rem*' and which therefore enabled the legal condition of the territory to survive the disappearance of the League.

While thus, for a variety of reasons, the Court reached the unanimous conclusion that South-West Africa remained a territory under the international mandate assumed by the Union of South Africa, there was no unanimity with regard to the extent of the obligations which continued to be binding upon the Union. The majority of the Court held that the obligations contained in article 22 of the Covenant and in the Mandate for South-West Africa continued to be binding, as well as the obligation to transmit petitions from the inhabitants of the territory; and that the supervisory functions previously exercised by the League were now exercisable by the United Nations. The majority of the judges arrived at this conclusion on the ground that the rights of the inhabitants could be safeguarded only if there was supervision by the United Nations which, for that purpose, had replaced the League. Judges M c N a i r and R e a d did not share this view. In the opinion of the former the succession of the United Nations to the administrative functions of the League had not been expressly laid down in the Charter; with regard to article 80 (1) of the Charter, which the majority of the Court had interpreted as applying to the maintenance of existing mandates, he took the view that it was irrelevant to the present question [134]). Judge Read took the view that the supervisory functions of the League had become impossible as a result of the disappearance of the League itself, and that this "impossibility of performance" could not be cured [135]).

(b) The second question before the Court was whether Chapter XII of the Charter was applicable to the territory concerned. This question was interpreted as meaning two different things: (I) Could the territory be placed under the Trusteeship System, and (II) was the Union of South Africa under a legal obligation to place it under that system?

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[133]) I. C. J. Reports 1950, at p. 151.

[134]) Loc. cit., at p. 160. Subsidiary contentions in support of the view that the supervisory functions of the League had devolved upon the United Nations in the case under review were based on certain statements made on behalf of the Union of South Africa and on certain resolutions passed by the General Assembly of the United Nations. These were also rejected by Judge M c N a i r ; see loc. cit., at pp. 160–161.

[135]) Loc. cit., at pp. 169 and 173. Ellison K a h n , loc. cit., at p. 91, considers the finding of the majority of the Court with regard to the supervisory competence of the United Nations to be untenable. In his opinion the views of Judges M c N a i r and R e a d are to be preferred.

(I) On the first part of the question the Court unanimously reached the conclusion that the territory could be placed under the Trusteeship System in accordance with the provisions of Chapter XII of the Charter.

(II) On the second part of the question the Court was almost equally divided; by a majority of only eight votes to six it held that Chapter XII of the Charter did not impose a legal obligation upon the Union of South Africa to place the territory under the Trusteeship System [136]). The majority of the judges were of opinion that the language of articles 75 and 77 of the Charter was permissive and could, therefore, not be interpreted as imposing upon the Mandatory an obligation to negotiate trusteeship agreements. With regard to article 80 (2) of the Charter, the majority did not consider that it enacted an exception to the voluntary principle contained in articles 75 and 77. Furthermore, once it had been held that there was no obligation to place the territory under trusteeship, it was, in the opinion of the majority, logically impossible to postulate a duty to negotiate agreements the conclusion of which was not obligatory.

Judge de Visscher, in his dissenting opinion, attached great importance to the words "shall" in articles 75 and 77 of the Charter and interpreted article 80 (1) as excluding, as far as possible, the continued co-existence of the old mandates system and the new trusteeship system. He did not go as far as to say that the legal obligation of a mandatory Power to negotiate a trusteeship agreement implied a duty to accept and conclude any agreement which was proposed to it, but he did not consider the duty of a State to negotiate as being logically incompatible with freedom to reject a proposed agreement which it considered to be unacceptable [137]).

Vive-President Guerrero and Judges Zoričič and Badawi Pasha did not deliver dissenting opinions of their own and merely declared that they shared Judge des Visscher's view [138]). Judges Alvarez and Krylow, on the other hand, delivered dissenting opinions of their own. The former went considerably further than Judge de Visscher. He took the view that the Union of South Africa was not only under an obligation to

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[136]) The Court consisted of only fourteen judges, Judge Fabela being absent. The six dissenting judges were: Vice-President Guerrero and Judges Alvarez, Zoričič, de Visscher, Badawi Pasha and Krylov; only Judges Alvarez, de Visscher and Krylov, however, delivered dissenting opinions of their own.

[137]) I. C. J. Reports 1950, at pp. 188 and 190. With regard to Judge de Visscher's interpretation of articles 75 and 77 of the Charter, it may be objected that the duty there postulated is a duty incumbent upon the Organisation itself and not upon the mandatory Power, and with regard to the other argument, it may be objected that a duty to negotiate is logically incompatible with freedom to accept or reject a proposed agreement.

[138]) Loc. cit., at p. 145.

negotiate, but also to conclude an agreement with the United Nations. This view was based on articles 75, 77 and 80 (2) of the Charter, and more especially on its general spirit. The obvious deadlock which would occur if the mandatory Power refused to conclude an agreement, would, in the opinion of Judge Alvarez, have to be referred to arbitration[139]). It is submitted that the mere fact that the Charter does not provide for arbitration in a case of this kind is sufficient ground not to accept a view which may result in deadlock, and that a duty to negotiate an agreement is the limit which an interpretation of the Charter might conceivably allow[140]).

(c) The question whether the Union of South Africa is entitled unilaterally to modify the status of South-West Africa was unanimously answered in the negative[141]). The answer could clearly be inferred from article 7 of the Mandate which postulates the consent of the Council of the League of Nations for a modification of the terms of the mandate.

In view of the negative answer to this part of the question, the further question arose as to the organ which, after the disappearance of the Council of the League, was competent to modify the status of the territory. The Court inferred, by analogy, from the authority of the General Assembly to approve alterations or amendments of trusteeship agreements (articles 79 and 85 of the Charter), that the power to modify the status of territories under mandate must similarly be vested in the General Assembly of the United Nations.

On the facts of the case the Court further took the view that the Union of South Africa had, by various declarations, recognised the competence of the General Assembly in relation to South-West Africa, and that therefore, for this reason also, the competence previously vested in the Council of the League was now vested in the General Assembly of the United Nations[142]).

VI. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide

Only one request for an advisory opinion was outstanding at the end of 1950. The request was submitted to the Court by the General Assembly on

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139) Ibid., at pp. 184 and 185.

140) Judge K r y l o v, in his dissenting opinion, did not go beyond this limit: loc. cit., at p. 191.

141) Loc. cit., at pp. 141 and 144.

142) Ibid., pp. 141–142. It is to be observed that, before answering the question concerning competence, the Court stressed that the normal way of modifying the status of the territory was to place it under trusteeship in accordance with the provisions of Chapter XII of the Charter: ibid., at p. 141.

November 17th, 1950, and was field in the Registry of the Court on November 20th, 1950[143]). It was framed in the following terms:

"In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and
(a) the parties which object to the reservation?
(b) those which accept it?

III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:
(a) by a signatory which has not yet ratified?
(b) by a State entitled to sign or accede but which has not yet done so?"

The advisory opinion was delivered on May 28th, 1951.

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From the foregoing observations it will be seen that the work achieved by the International Court in the course of the first five years of its existence has been extremely important, although perhaps the number of cases submitted to it has not been as great as that submitted to its predecessor during the corresponding period after the first World War. The nature of the cases brought before it, however, proves that the reluctance of States to submit to judicial scrutiny matters of vital importance to themselves has been partly overcome. On the other hand, the number of preliminary objections, both with regard to contentious cases and advisory opinions, is evidence of the fact that proceedings before the Court are not yet regarded as being the normal means of settling disputes. Until there has been a change of attitude on the part of governments, the jurisdiction of the Court will remain relatively limited in scope. It is perhaps not without interest to observe that as long ago as November, 1947, the General Assembly, on the initiative of Australia, adopted three resulutions designed to induce member States to make greater use of the Court in the settlement of international disputes

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143) This is Case No. 12 in the Court's List; see I. C. J. Reports 1950, p. 406 et seq. This advisory opinion will be found in I. C. J. Reports 1951, at p. 15 et seq.

and to take advantage of the facilities of article 36 of the Statute [144]). The fact that since November 1947 only a comparatively small number of contentious cases has been submitted to the Court is proof that these resolutions have had little effect in persuading States to eccept recourse to the Court as the normal procedure of settling disputes between themselves. This, however, is a matter of small moment as, given time and a change in psychological outlook, States will come to realise that the International Court deserves greater attention than it has received so far. What is far more disturbing is a tendency, on the part of some governments, to ignore the judgments and advisory opinions of the Court. The *Corfu Channel Case* is an example of contentious proceedings in which the judgment of the Court has been completely ignored by the unsuccessful party; and the case of the *Interpretation of the Bulgarian, Hungarian and Rumanian Peace Treaties* is an example of an advisory opinion ignored by one of the Parties [145]).

If this tendency were to grow, especially with regard to advisory opinions where frequently the legalistic view is propounded that such opinions are not binding, we may well be faced with a situation in which the prestige of the Court is bound to suffer. The lack of co-operation by some governments is all the more regrettable in view of the Court's restraint in its judicial capacity to go beyond the ambit of the questions submitted for decision. The cases which have been referred to abound in examples of the anxiety of the Court not to concern itself with matters which may be considered to exceed its competence: the refusal of the majority of the Court to decide whether or not article 25 of the Charter has introduced a new case of compulsory jurisdiction [146]); the refusal to deal with the question of whether or not warships are entitled to innocent passage through territorial waters in time of peace [147]); Judge Azevedo's comment on the undesirability of even implicitly attributing guilt to a State not party to the proceedings before the Court [148]); and the strict observance by the Court in the *Asylum Case* of the rule that

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144) Cf. United Nations Document A/519, 1948, p. 104. Also: E. Hambro, The International Court of Justice in Year Book of World Affairs, vol. 3 (1949), p. 188 et seq., at p. 197.

145) The Union of South Africa has also refused to accept the advisory opinion of the Court. She maintains that the mandate over the territory of South-West Africa was originally granted to her by the Principal Allied and Associated Powers after the first World War and that any agreement that might be concluded in the future should therefore be concluded with France, Great Britain and the United States of America. It is reported that the Union Government has now offered to negotiate such an agreement with these three Powers: "Observer" newspaper of 4th November, 1951.

146) See supra, the preliminary objection in the *Corfu Channel Case*.

147) See supra, the judgment on the merits of the *Corfu Channel Case*.

148) Ibid.

the Court's competence must be limited to matters contained in the submissions of the Parties.

The non-cooperative attitude of some governments is all the more incomprehensible when it is remembered that the composition of the Court, from the point of view of geographical distribution, is wider than was that of the Permanent Court. It has been pointed out that Latin-American countries are now represented by four instead of three judges, and that for the first time there is a judge representing Islamic culture [149]). In addition, article 31 (1) and (2) provides for the appointment of judges '*ad hoc*' in certain circumstances. With regard to this provision, it may be said that the appointment of judges '*ad hoc*' is an institution on the value of which opinions may differ. In it may be seen a concession to an antiquated conception of the functions of the Court, and at best it is a compromise solution which should be abandoned as soon as the true character of the International Court as a purely judicial tribunal has become firmly established in the minds of governments.

It is sometimes said that the number of dissenting judgments is unduly large and the margin of error too wide [150]). When it is remembered that the number of judges is far greater than that of any municipal court and that the law which the Court applies is far less certain than any municipal law, this is not surprising. Even the jurisprudence of most civilised countries abounds in examples of divergencies of opinion among judges, and in countries where two appeals can be brought, we frequently find that the two appeal courts not only differ from one another, but also from the court of first instance. The International Court being a court whose judgments are not open to appeal, it is only natural that any divergencies there may be should appear in a comparatively large number of dissenting judgments and opinions. Judges of fifteen different nationalities who are accustomed to different systems of law are bound frequently to differ in their approach to any given question, and viewed from this angle, the number of unanimous decisions on some questions submitted to the Court may even seem surprising [151]).

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[149]) See Hambro, loc. cit., at pp. 193–194. Owing to the prolonged absence of Judge Fabela (Mexico) and the death, in May 1951, of Judge Azevedo (Brazil) Latin-America is at present represented by only two judges: Vice-President Guerrero and Judge Alvarez. A biography of all the judges of the Court can be found in the Court's Year Book for 1946–1947, pp. 42–57.

[150]) See e.g. G. Schwarzenberger: Trends in the Practice of the World Court, in Current Legal Problems, vol. 4 (1951), pp. 1–34, at p. 32.

[151]) Schwarzenberger's view (loc. cit., at p. 31) that any one of the cases before the Court might well have been decided the opposite way cannot be shared.

Such shortcomings as, in the view of some writers, have become apparent in the course of the last five years, are almost entirely due to the reluctance of governments to forego their own narrow national interests and to abide by the decisions of the Court. Once this reluctance has been overcome, the prestige of the Court will grow, and the Court will take its rightful place in international life.

London, November 1951

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STAATS- UND VERWALTUNGSRECHT

BUNDESREPUBLIK DEUTSCHLAND

Gesetz über die Rechtsstellung heimatloser Ausländer im Bundesgebiet vom 25. April 1951 [1])

Der Bundestag hat das folgende Gesetz beschlossen:

Kapitel I. Allgemeine Vorschriften

§ 1. (1) Heimatloser Ausländer im Sinne dieses Gesetzes ist ein fremder Staatsangehöriger oder Staatenloser, der

a) nachweist, daß er der Obhut der Internationalen Organisation untersteht, die von den Vereinten Nationen mit der Betreuung verschleppter Personen und Flüchtlinge beauftragt ist, und
b) nicht Deutscher nach Artikel 116 des Grundgesetzes ist und
c) am 30. Juni 1950 seinen Aufenthalt im Geltungsbereich des Grundgesetzes oder in Berlin (West) hatte oder die Rechtsstellung eines heimatlosen Ausländers auf Grund der Bestimmungen des § 2 Abs. 3 erwirbt.

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[1]) Bundesgesetzblatt I, S. 269. Dazu die Abhandlung von Makarov, oben S. 431 ff.