

ABHANDLUNGEN

Dissenting and Individual Opinions in the International Court of Justice¹⁾

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I.

The question of dissent within courts of justice consisting of more than a single judge is difficult and complicated. It has been given different solutions in various countries and throughout history. The solution given to the problem in international courts has also differed widely, and it cannot be said that there is unanimity on the point even today.

The question is also to some extent rather peculiar because it would seem that individual judges through their dissents have contributed greatly to the development of municipal law²⁾ whereas this would not seem to be the case in the International Court³⁾.

One contributing reason for this is undoubtedly the rarity of international awards. Whereas national judgments in each individual country can be counted by the hundreds every year, international awards can generally be

1) For literature see particularly Manley O. Hudson, *International Tribunals, Past and Future*, Washington D.C. 1944 p. 111 ff. and *The Permanent Court of International Justice, 1920-1942*, New York 1943, p. 205 and 588; Heinrich Lammasc, *Die Rechtskraft Internationaler Schiedssprüche*, Kristiania 1913 p. 77 ff., A. Merignhac, *Traité théorique et pratique de l'Arbitrage international*, Paris 1895, p. 273 ff.; Graf Stauffenberg, *Statut et Règlement de la Cour Permanente de Justice Internationale*, Berlin 1934, p. 410 ff.; J. L. Toffin, *La Dissidence à la Cour Permanente de Justice Internationale*, Paris 1937 and J. C. Witenberg, *L'Organisation judiciaire, la Procédure et la Sentence Internationales*, Paris 1937, p. 276 ff.

2) The whole legal history of the Common Law countries is redolent with the names of great judges; and their influence even today is difficult for foreigners to understand. However, some observers add a grain of salt. See e.g. R. M. Jackson, *The Machinery of justice in England*, 2 ed. Cambridge 1953, p. 221 ff.

3) Even Anzilotti, "The Great dissenter" exercised greater influence, it is submitted, through his extra judicial writings and his personality than through his published dissents.

counted on the fingers of one hand. This may explain why the negative side of a dissenting opinion is more prominent and the positive side less in evidence in international than in national jurisprudence. It is, therefore, possible that a bird's eye view of the problem might not be wholly void of interest.

The plan of this article is to start off in a first section (II) with a few remarks on the solution given in national courts. Thereafter the practice in courts of arbitration will be shortly reviewed (III). This section will be followed by a short history of the problem in the Peace Conferences at the Hague (IV).

Thereafter will follow a short excursion into the preparatory work preceding the establishment of the Statute of the Permanent Court of International Justice (V). A somewhat longer section will be devoted to the debates within that court (VI) followed by an examination of the judicial practice of the court (VII). Section VIII will deal with the debates during the second world war and section IX with the practice of the International Court of Justice. One section will be devoted to an evaluation of the good and bad sides of the practice thus described (X) to be followed by some tentative conclusions (XI).

II.

It is believed that all countries possess today collegiate courts in the last and final resort. It must be a common experience that the judges do not always agree. Even the lay mind will realise that only the more complicated questions come up before the Supreme Court. When able advocates differ in opinion and when the lower courts give conflicting judgments, it would indeed be strange if the members of the Supreme Court should be unanimous.

Since probably nobody today indulges in the illusion of unanimous courts it can hardly be necessary to labour the point. But it is interesting to note that opposing solutions have been adopted to meet the problems created by division within the highest courts. One point of view is that the judgment should not be the judgment of the individual judges but the judgment of the court. It should be clothed in the whole majesty of the law. It should be completely anonymous. The deliberations of the court room must be secret. If this were not so, the judges might be intimidated and lose their independence. The same may be said about their vote. Even if the deliberations are secret, that is not enough if the judges are forced to give their votes and arguments in public. This might also lay them open to all kinds of pressure. There is also another very good reason for secrecy, namely the authority of the judgment itself. If it is known that the judgment is not unanimous, it

will carry less weight and be less respected. It leaps to the eye that a pronouncement given by a court divided 2 to 3, 3 to 4 or 4 to 5, or even by the president's casting vote, is not of the same value as a judgment given by a united court.

On the other hand it is not so certain that these arguments are decisive. It is possible that the judges get a stronger feeling of responsibility if they have to make their votes and even their individual reasoning known to the public. And when it is known – as it must be known – that a great part of the judgments are not in fact unanimous, would it then not be more honest and more realistic to make this known officially instead of leaving it to guesses and rumours? Also, there is another argument: if the court is divided on an important question of law, may that not indicate that the law is perhaps not wholly satisfactory on that point? May it not lead to a change of the law? May it not even happen that the majority of the Court can be shaken and that a sound development may lead to a change in the jurisprudence on this particular point? Would not the rule of secret votes and anonymous judgment lead to rigidity and stagnation?

A comparative study of voting procedures and of dissenting opinions in different countries would be valuable in this respect, but would lead too far in this article. A few examples must suffice to show the different patterns in municipal law. In the Supreme Court of the United States the judgments are often divided as was seen particularly during the constitutional crisis precipitated by the new deal ⁴⁾. In Great Britain the practice is very interesting indeed. One might say that there are two Supreme Courts, namely the House of Lords and the Privy Council. In the House of Lords each judge gives his individual vote, but in the Privy Council the vote is anonymous and no dissent is indicated. Historically this is no doubt due to the fact that the House of Lords is a real court whereas the Privy Council gives its decisions in the form of advice to the head of State and does not give a decision. It is interesting to keep in mind that the two systems are used in England which is in the popular opinion held to have consecrated the principle of individual votes. And what votes! Some of them among the very best legal writing in the English tongue ⁵⁾.

⁴⁾ The Supreme Court has played a very great part in the constitutional history of the U.S.A. See f. ins. the classical Bryce, *American Commonwealth*, 3 ed. 1904, vol. I, p. 228 and the widely used textbook, Ogg & Ray, *American Government*, 6 ed. 1938, p. 419 ff. When the Supreme Court was in the limelight in the 1930 it was for political motives. See f. ms. Moley, *After seven years*, p. 350 ff.

⁵⁾ An interesting indication of this on the purely literary plane is that some of the *dicta* of English judges have found their way into the Oxford Book of English Prose (here quoted from the 1930 edition): 1. Lord Justice Bowen in *Mogul Steamship Company v. McGregor Gow & Co.* (Law Reports 1889, 23 Q.B.D. at p. 615), No. 487 at p. 853; 2. Ed-

In the French and Belgian courts the judgments appear without any mention of the majority or of the vote. The same is the case with the Supreme Court in Germany ⁶⁾, whereas the Swiss courts, to the surprise of most of the readers of the Federal Reports in principle have public voting ^{6a)}.

Norway has not always followed the same system. Until 1864 the vote in the Supreme Court was secret, but was changed that year and since then the same system has been used as in the House of Lords ⁷⁾. It has been claimed by a very prominent lawyer, first well known as a writer and advocate and later as a member of the Supreme Court that it is the open vote that has assured for the Norwegian Supreme Court the very high reputation it enjoys ⁸⁾.

Sweden follows the same system as Norway ⁹⁾, whereas Denmark has had a secret vote until very recently. An effort was made in the 1930's to change this system and adopt the Norwegian system. The change was, however, not effected, and the system followed today is an intermediary one. The vote is not made known, nor the name of the dissenters, but the dissenting arguments are explained after the reasons for the majority opinion have been given ¹⁰⁾.

It would be difficult to say that the reputation and usefulness of the Courts have been much influenced by these different techniques. The esteem of the Court depends on the reasoning of the judgments and not on the form

ward Lord Macnaghten in *Gluckstein v. Barnes* (Law Reports, 1900 A.C. at p. 255, 258), No. 479 at p. 838; and 3. Lord Sumner of Ibstone in *Bowman v. Secular Society Ltd.* (Law Reports, 1917 A.C. at p. 466), No. 557 at p. 982.

There are so many other excellent judgments that it is difficult to make any selection. One might, however, draw attention to the *dicta* of Lord Wright, as for instance in *Mount Albert Borough Council v. Australasian & C. Life Insurance Society Ltd.* (1938) A.C. 224.

⁶⁾ See Schätz el, *Archiv des öffentlichen Rechts* 78 (1952/53), p. 236, and Giese, *ib.* p. 389 ff.

^{6a)} See article 17 of the *Loi Fédérale sur l'Organisation Judiciaire* (15 december 1931) and *Règlement du Tribunal Fédéral* (21 october 1944). See also W. Birchweiser, *Handbuch des Bundesgesetzes über die Organisation der Bundesrechtspflege*; Emanuel Grüninger, *Bundesgesetz über die Organisation der Bundesrechtspflege*; M. Guldener, *Das Zivilprozessrecht der Schweiz*.

⁷⁾ This development has been described in an illuminating article by Henry Østlid in (*Scandinavian review* published in Oslo) *Tidsskrift for Rettsvitenskap* 1955, p. 170 ff.

⁸⁾ Ferdinand Schjelderup in an article in (*The Danish*) *Ugeskrift for Retsvæsen* 1926 B., p. 118 ff.

⁹⁾ There are, of course, many differences due to historical courses, but for our purpose it must suffice to state that there is an individual and open vote and full freedom for dissenting votes.

¹⁰⁾ See (*The Danish Parliamentary papers*) *Rigsdagstidende Tillæg B.* 1931-32, p. 161 and 2549. See also Munch Petersen's article in (*The Danish*) *Ugeskrift for Retsvæsen* 1926 B., p. 1 ff., N. H. Bache *ibidem*, p. 13 ff. and Schjelderup, p. 118 ff.

in which it is expressed. The popularity of the Court depends on the degree to which it acts in accordance with the prevailing convictions of the enlightened part of the population.

As far as logic is concerned there is little to choose between the systems. Full openness or complete secrecy might be equally good. The intermediate solution followed in Denmark and in the International Court of Justice does not appeal so much to logic, but can be defended for practical reasons.

III.

A reading of the published "awards", "judgments", "sentences" or other decisions of tribunals of arbitration in modern times would seem to indicate that dissent within an arbitration commission is not an exception¹¹⁾, apart from arbitration by a single judge, more often than not a head of State¹²⁾. In this respect the opposite of one man tribunals consists of the different mixed claims tribunals and other mixed tribunals where the idea was that the national commissioner should be free to express his own opinion and actually in most cases acted more as an advocate than as a judge. A very keen and experienced judge and writer has summarised the experience of these tribunals in the following words¹³⁾:

"If it is doubtful whether some of the dissenting opinions by members of temporary tribunals have served much useful purpose beyond that of relieving the authors of possible odium, others of them have been valuable as expositions of juristic principles".

Judge *Hudson's* experience and unsurpassed authority gives this utterance great weight. One is, however, tempted to qualify it a bit. It is submitted with great diffidence that in spite of outstanding exceptions most of the dissents constitute partisan pleading more than valuable contributions to the development of international law. Furthermore, it is submitted that the possibility of a dissent is a very mixed blessing for the national judge. Since it is assumed in most cases that a member of a tribunal may express his disagreement with the findings of his colleagues, a "national" judge feels under the obligation to write a dissent even though he would have been

¹¹⁾ Anybody can see that by going through the collections published by Lafontaine and Lapradelle-Politis as well as the more recent Hague Court Reports and United Nations Reports.

¹²⁾ The Czar of Russia, the Emperors of Germany and of Austria, the Kings of Belgium, Italy, Netherlands, Norway-Sweden, Prussia, Saudi Arabia and Saxony as well as the Presidents of Chile, France, Nicaragua and the United States have acted as arbitrators as well as the Pope and several Presidents designated by name.

¹³⁾ Judge Manley O. Hudson at p. 117 in his book *International Tribunals, Past and Future*, Washington D.C. 1944.

happier and less embarrassed if this had not been incumbent upon him. But this tradition is so strong that most national judges would feel so compelled unless the special agreement expressly laid down the rule that dissents could not be expressed ¹⁴).

It might be added here that the question of the signature of the award is linked up with the question of dissent. For that reason it has been common – although not invariable ¹⁵) – practice in modern time to have the award signed by the President and Secretary of the tribunal and not by all members. It has also been the accepted practice to allow an ordinary majority to make the decisions of the tribunal in case of disagreement.

IV.

The Hague Convention of 1899 consecrated this practice in its article 52 ¹⁶). This provision was found in the Russian draft which formed the basis of discussion ¹⁷) and came through all the different drafts unchanged ¹⁸). The rapporteur who discussed the reasons for the award did not with a word mention the question of dissenting opinions ¹⁹) and it is, therefore, not possible to find out why this provision was adopted with no apparent dissent.

The situation of 1907 was quite different. During that Conference this problem was not allowed to go by default. The Dutch delegate, L o e f f, who had some experience as a judge ²⁰), made a very strong appeal for the suppression of the dissents ²¹). He mustered all the arguments in favour of a unanimous or anonymous judgment and stated as his considered opinion that the dissents undermined the authority of the judgment and destroyed the confidence in the tribunal. He changed the old adage, « *Roma locuta est, res finita est* », to « *Tribunal locutum est, res finita est* ». He meant that the

¹⁴) This was the case in the Ambatielos Case decided by an international Tribunal in London on March 6, 1956. The President of the Tribunal, A l f a r o of Panama, appended a note about his disagreement with one point of the judgment and the Greek judge, S p i r o p o u l o s, made a whole dissenting opinion although nothing about this possibility could be found in the special agreement.

¹⁵) The above mentioned Ambatielos Award was signed by all the members of the tribunal and the Registrar.

¹⁶) La sentence arbitrale, votée à la majorité des voix, est motivée. Elle est rédigée par écrit et signée par chacun des membres du Tribunal. Ceux des membres qui sont restés en minorité peuvent constater, en signant, leur dissentiment.

¹⁷) Article 22, Vol. IV, p. 206 in the official documents of the Hague Conference.

¹⁸) *Ibidem*, p. 256 and 265.

¹⁹) *Ibidem* Vol. I., p. 137 f. He added, however, that the dissenting members of the tribunals were free to state their dissent without giving reasons.

²⁰) He had been President of the Tribunal in the Grisebæne Case between Norway and Sweden.

²¹) At p. 359 in Vol. II of the official documents of the Second Peace Conference.

possibility of open dissent was against the finality of the award and would open the door to discussions of the merits of the award outside the tribunal. The discussions after his intervention did not bring forth any new arguments²²⁾ and the new article 79 as adopted suppressed these dissents, and decided that the award should only be signed by the President and the Registrar²³⁾.

V.

There was, thus, a certain practice in this respect before 1914; and when it was decided as a part of the peace settlement after the first world war to institute a Permanent Court of International Justice, this practice was naturally taken into consideration.

A considerable documentation formed the basis of the debates. Some of the drafts presented contained proposals to the effect that dissenting opinions should be permitted²⁴⁾ while other proposals expressed themselves against this idea²⁵⁾.

The Committee of Jurists²⁶⁾ discussed this problem on July 20th, 1920, and reached the conclusion that a judge should be allowed to publish his dissent, but not to write a dissenting opinion. The fact should be made known, but not the reasons²⁷⁾. The Report of the Committee explained this in more detail giving the history of the problem before other courts²⁸⁾.

The Council of the League at its Tenth Meeting held in Brussels in October 1920, changed this and introduced the right of the judges to add to it a statement of their individual opinions²⁹⁾. This was later retained by the Committee of Jurists³⁰⁾. Sir Cecil Hurst defended this point of view in the Subcommittee of the Assembly where it was adopted³¹⁾. At last it was

²²⁾ *Ibidem*, p. 586, 732 and 758 as well as Vol. I, p. 436 f.

²³⁾ La sentence arbitrale est motivée. Elle mentionne les noms des Arbitres; elle est signée par le Président et par le Greffier ou le Secrétaire faisant fonction de Greffier.

²⁴⁾ For instance in article 46 of the draft of the neutral powers, P.C.I.J. Advisory Committee of Jurists, Documents, p. 319.

²⁵⁾ Such would seem to be the Dutch plan in Article 45, *ibidem* p. 291. Even stronger against the dissenting opinions was the Italian Government at a later date. See L. o. N.; P.C.I.J. Documents, p. 30.

²⁶⁾ Consisting of Adatci, Altamira, Clovis Bevilacqua, Descamps, Hagerup, Lapradelle, Loder, Phillimore, Ricci-Busatti and Root.

²⁷⁾ Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux, p. 591.

²⁸⁾ *Ibidem*, p. 742.

²⁹⁾ L. o. N.; P.C.I.J. Documents, p. 44 and 196.

³⁰⁾ *Ib.* p. 60. See also the tables of comparison inserted in that volume at p. 40 and 81.

³¹⁾ *Ibidem* p. 138.

also adopted without a dissent in the Assembly ³²⁾ and inserted in the Statute in the following form:

“If the judgment does not represent in whole or in part the unanimous opinion of the judges, the dissenting judges are entitled to deliver a separate opinion”.

VI.

The Permanent Court did not discuss the matter of dissenting opinions to any length in its preliminary session, but engaged in a long debate in July 1926 when they discussed the possibility of revision of the rules ³³⁾.

In spite of the express provision of the Statute the judges discussed the whole principle of dissenting opinions. But since they could not change the statute they concentrated on two special problems, viz. advisory opinions and secret dissents. It seems to have been the practice for some judges to have added their votes to the confidential minutes of the Court in the council room. This was now finally abolished.

A proposal had been made to suppress the mention of the dissents in advisory proceedings. It was claimed that the dissenting opinions represented an exception to the rule that the Court should act as a body and that, therefore, it must be given a restrictive interpretation. This point of view was not retained by the Court. The feeling was that publicity was of the essence and that it was quite impossible to suppress these dissents now after the Court had adopted the rule of permitting them and a tradition had been created. It would – so it was stated – destroy the confidence in the Court although other judges claimed that a divided opinion would be of little help for the organ which requested it.

It was also discussed whether the Court should mention the names of all the judges who dissented. It was decided that this could not be done. The rule of the Court was that the secrecy of the proceedings in the council chamber must be kept. The judges had been given the right to dissent, but no duty had been imposed upon them.

The third question which was discussed during that exchange of views was whether the actual result of the voting should be made known. It was decided that the judgment should mention the number of votes but not the names of the dissenters. The reason for this was as stated above that no judge could be forced to state his dissent, but, on the other hand, it would make a strange impression if the Court stated whether it was unanimous or consisted of a majority if it were not made clear that the majority consisted of a

³²⁾ *Ibidem* p. 103.

³³⁾ P.C.I.J., Ser. D., Acts and Documents, Addendum to No. 2, p. 194 ff.

certain number, because there was a sensible difference between a court divided 14 to one or one divided seven to seven and decided with the President's casting vote.

This practice which has also been followed by the International Court of Justice leads to the result that those judges who make dissenting opinions are known whereas other judges in the minority remain anonymous.

It can hardly be claimed that it is wholly satisfactory and it has happened more than once that people have been led to find out how the voting was by devious means.

In the Court there was a core of a strong opposition against publicity and in favour of the "continental" system of secret vote³⁴). It should be added that the voting was not always along national lines because Anzilotti was the strongest partisan of open votes in the Court although the system of secret voting obtains in Italy. It might also be added that later tribunals do not always adhere to the rule that the number of votes should be made known³⁵).

The question was again discussed amply in the 1929 Committee for the Revision of the Statute in view of the possibility of the adherence of the U.S.A. to the Court³⁶). Monsieur Fromageot very strongly opposed the dissenting opinions and made a formal proposal to change them³⁷). Sir Cecil Hurst stated that in his view the proposal "would destroy the Court" and might make it impossible for the U.S.A. to adhere to it³⁸). Mr. Root stated that the suppression "in his view [would] be disastrous"³⁹).

It is interesting to note that M. Politis so very strongly recommended the retention of the dissenting opinions:

"M. Politis said he had always been greatly impressed by the manner in which awards were rendered by arbitrators in the English-speaking countries. The influence of that system on the development of law had been greater than that of the continental system. In the interests of the building-up of an inter-

³⁴) The very vocal minority consisted of former President Loder (Netherlands) and judges Nyholm (Denmark) and Weiss (France).

³⁵) The award in the Ambatielos Case did not mention the votes.

³⁶) The members were Scialoja (Chairman), van Eysinga (Vice-Chairman), Fromageot, Gaus, Hurst, Ito, Pilotti, Politis, Ræstad, Root, Rundstein, Urrutia. Anzilotti, Huber and Osuski were invited to participate in the work of the committee and Joseph Nisot was the secretary of the committee.

³⁷) Minutes of the Committee, L. o. N. Official No. C. 166. M. 66. 1929. V., p. 50. Fromageot later was a member of the Court.

³⁸) *Ibidem* p. 50. Sir Cecil was later a member and subsequently a President of the Court.

³⁹) *Ibidem* p. 51.

national jurisprudence there was no doubt that the publication of dissentient opinions was of immense value. When, nine years ago, the recommendations of the jurists at The Hague had been discussed by the Assembly during its first session, he had felt some hesitation in accepting the Anglo-Saxon system, and he had finally agreed to that system in a spirit of conciliation. Since then, however, he had watched the working of the Court, and he had noted the value and importance of dissentient opinions, so much so that if, by chance, representatives of the Anglo-Saxon countries were to ask for their suppression, he would feel obliged to oppose the suggestion, because, in his view, those opinions were of immense advantage to international law.

The value of a decision of the Court varied according as it was taken by a unanimous or majority vote, and it was essential that the public should know of this fact. The duty of the Court was not merely to settle disputes brought before it. It should establish a jurisprudence based only on the opinions of the judges. It was important to be in a position to know and to appreciate the motives which had influenced all the judges, those in the majority as well as those in the minority. The publication of these divergent opinions enabled observers to appreciate the scope and scientific value of the judgments.

There was another argument in favour of the publication of dissentient opinions. A Government which lost a case might find some consolation in knowing that the Court had been divided and that dissentient opinions in accordance with its own views had been expressed. The publication of such opinions would show, at any rate, that the Government had not been quite wrong in bringing the case before the Court" 40).

Max H u b e r , former President of the Court, added the weight of his intellectual and moral authority to his point of view:

"M. Huber said that within the Court itself there had been a very distinct divergence of views on the subject. Arguments had been put forward both for and against the publication of dissentient opinions. In 1922 the Court had felt a certain reserve in dealing with this subject. In 1926, however, the Court had expressed itself as definitely in favour of developing the system of dissentient opinions. In the revised Rules of Court, it was not only laid down that the judgments and advisory opinions should state the reasons on which they were based, but should mention the number of judges constituting the majority. These provisions had been laid down in the conviction that it was necessary to inform the public of the truth and to avoid the appearance of unanimity or almost unanimity which did not exist. As the publication of dissentient opinions was optional, judges might hesitate, although not in agreement with the decision, to attach their dissentient opinions to the judgment. In these circumstances, the absence of dissentient opinions or a great reduction in their number might give rise to the erroneous idea that the judgment represented the opinion of all the

40) *Ibidem* p. 51.

judges or of the great majority. The authority of the Court could only be increased by the whole truth.

He was not revealing any secret in stating that M. Anzilotti and he himself had, during the discussions of this question in the Court, when it had drafted and revised its Rules, supported the publication of dissentient opinions. The Court had considered that the publication of such opinions not only had all the advantages to which M. Politis had referred, but that the possibility of the publication of those opinions made it necessary for the Court to examine very carefully the different points of view brought forward by the judges, and to state clearly the reasons for its awards. The Court had also felt that the possibility of publication was a guarantee against any subconscious intrusion of political considerations, and that judgments were more likely to be given in accordance with the real force of the arguments submitted. He felt that it was essential to retain the right of individual judges to publish their views, and he would urge that this right was an essential condition for the exercise of their liberty of conscience and their impartiality" ⁴¹⁾.

The result of the debate was that M. Fromageot withdrew his proposal so that the practice continued that the dissenting judges were allowed but not obliged to state their dissenting opinions ⁴²⁾.

VII.

At this point it would be of interest to see how the members of the Court have made use of their right to dissent. It is necessary to insert at this point the remark that it has been the practice of the Court that not only those members who disagreed with the result were allowed to state their dissent, but that also those members who agreed with the result but for other reasons were allowed to give expression to their reasoning. Article 57 of the Statute reads now:

„If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion" ⁴³⁾.

It is not believed to be necessary for the purposes of this article to trace the development of this practice, which, of course, for the authority of the judgment has about the same effect as a dissent.

⁴¹⁾ *Ibidem* p. 52.

⁴²⁾ *Ibidem* p. 52.

⁴³⁾ Article 74 second paragraph of the rules reads: "Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not, or a bare statement of his dissent". And Article 84 second paragraph of the Rules dealing with advisory opinions reads: "Any judge may, if he so desires, attach his individual opinion to the advisory opinion of the Court, whether he dissents from the majority or not, or a bare statement of his dissent".

A member who dissents from the whole of the judgment or opinion makes "a dissenting" opinion and the member who accepts the operative part but not the reasons of the Court makes an "individual" opinion⁴⁴⁾.

This may, of course, create difficulties for the judge who agrees with all, but a small part of the judgment. It is also seen that in certain decisions the Court splits the vote and that the majority varies according to the question⁴⁵⁾.

It should be added that it is possible for a judge to add to a decision the expression of his dissent without making a whole dissenting opinion; but it is not certain that it is helpful when a judge shows his superiority to his colleagues by stating that he does not accept the reasoning of his colleagues "other reasons being in his opinion more decisive"⁴⁶⁾. It may be a loss to international law that these decisive reasons remain obscure⁴⁷⁾.

The members of the P.C.I.J. used their right in this respect fairly freely. During the time of its existence the Court delivered 35 judgments⁴⁸⁾, some of them concerning the competence of the Court. Out of these judgments only three were unanimous, and of those two were delivered by the Chamber for Summary Procedure⁴⁹⁾ and the remaining one was a judgment on a preliminary exception⁵⁰⁾.

In nearly all cases the judges *ad hoc* dissented if their party was not gaining the cause⁵¹⁾, but there are only two cases where the judge *ad hoc* was the only dissenting member of the Court⁵²⁾.

The Court delivered 23 advisory opinions and here the picture is somewhat lighter. There were 15 unanimous opinions⁵³⁾ and in two of them the

44) See Year Book of the Court, 1950-1951, p. 118.

45) For instance Reparation for Injuries case, I.C.J. Reports 1949, p. 187.

46) Judge B a s d e v a n t in the Corfu Channel Case, I.C.J. Reports, 1949, p. 37.

47) Among many examples one can mention Judge A l v a r e z in the Minquiers Case. I.C.J. Reports 1953, p. 73.

48) A complete list of the Judgments and Opinions is set out in H a m b r o , Case Law of the International Court, Leyden 1952, p. 426 ff.

49) The two cases concerning the interpretation of an article in the Treaty of Neuilly, P.C.I.J. Ser. A Nos. 3 and 4.

50) The Borchgrave Case, Ser. A/B No. 72 and The Phosphate Case, Ser. A/B No. 74.

51) It is the opinion of this writer that the Judges *ad hoc* in 9 cases of 10 do harm to the working of the Court, that they are in an invidious position as standing somewhere between independent judges and representatives of the parties. They have to give a solemn declaration to act as judge and are still expected by their countries - in most cases - to defend their interests. If the Statute of the Court should ever be amended, it is hoped that determined efforts will be made to suppress this institution.

52) In the Peter Pázmány University Case, Ser. A/B No. 61, and in Polish Upper Silesia Case, Ser. A No. 6 and 7.

53) Designation of Workers' Delegate (Ser. B No. 1; I.L.O. and Agriculture, B No. 3; Nationality Decrees in Tunis, B No. 4; German settlers, B No. 6; Polish nationality, B No. 7; Jaworzina Case, B No. 8; Albanian frontier, B No. 9; Exchange of populations, B

judges *ad hoc* participated⁵⁴). If we look at the matter quite realistically it will be seen that the full Court delivered 20 judgments on the merits of a case, and that not one of them was unanimous, whereas the advisory cases, being less controversial, could show nearly two thirds given by an undivided Court. It should be added for the sake of completeness that dissents have been permitted and used even in some orders. Statistics prove that the opinions or judgments of the Court, that is the majority of the Court, take up some 1390 pages of the record and the opinions of individual judges some 910 pages.

It is possible that this picture gives a somewhat exaggerated impression of unity within the Court. Until 1927 the Court did not indicate the number of votes in advisory opinions. The first opinion where the new practice has been adopted is B No. 14. It is, therefore, perfectly possible that there were dissents within the Court even before that time, in the opinions which appear to be unanimous. It is possible that some judges might have disagreed, but did not deem it wise to disagree openly because they may have believed that their disagreement on perhaps minor points did not justify them in harming the authority of the opinion.

VIII.

The conclusions from this description of the dissents within the Court shall not be given before the end of this article when the two Courts shall be treated as a unity. It may, however, at this point be of a certain interest to see what a committee of experts appointed during the second world war had to say about this point when they started the work on preparing for the establishment of the new Court.

The Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice⁵⁵) stated in its Report⁵⁶):

No. 10; Polish postal service in Danzig, B No. 11; Frontier between Turkey and Iraq, B No. 12; Personal Work of Employer, B No. 13; Jurisdiction of Courts of Danzig, B No. 15; Greco-Turkish Agreement, B No. 16; Communities Case, B No. 17; and the Polish-Lithuanian railway traffic, A/B No. 42.

⁵⁴) B No. 15 and 16, and A/B No. 42.

⁵⁵) The committee consisted of Sir William Malkin as chairman, and the following members: Georges Kaeckenbeck (Belgium), D. M. Johnson (Canada), Frantisek Havlicek (Czechoslovakia), R. Cassin and A. Gros (France), C. Stavrapoulos (Greece), Georges Schommer (Luxemburg), E. Star-Busman (Netherlands), R. M. Campbell (New Zealand), Erik Colban (Norway) and Bohdan Winarski (Poland). With Mr. G. M. (as he then was) Fitzmaurice as secretary.

⁵⁶) H. M. Stationary Office, Miscellaneous No. 2 (1944) Cmd. 6531, p. 23/24.

"81. The foregoing observations bring us to the question of dissenting judgments. Some of us were inclined to think at first that these should be abolished, on the ground that the main object of the proceedings was to secure a decision and to announce the reasons in support of it, so that dissenting judgments were, in strictness, both irrelevant and liable to weaken the authority of the actual decision. Despite these considerations, however, we are of opinion that the system of dissenting judgments, which we believe to have proved satisfactory in the experience of the Permanent Court of International Justice, should be maintained for the following reasons:

- a) In any matter sufficiently difficult and controversial to come before the Court at all, it is inherently improbable that all the members of a Court of 9 or 11 Judges will be unanimous in their view. The appearance of unanimity produced by the absence of dissenting judgments would therefore to some extent be false and misleading.
- b) If the Court was not in fact unanimous, this is almost certain to become known, together with the names of those Judges who did not concur in the majority view. In these circumstances, we think it far better that those who dissent should say so in open court and give their reasons.
- c) We think that dissenting judgments have a very considerable political and psychological value. It is a much more satisfactory state of affairs from the point of view of the losing party if the arguments in support of its case are set out in a reasoned judgment, so that it is plain that they have been given full weight.
- d) From the point of view of the development of international law, dissenting judgments are also of value. They act as a useful commentary on the decision of the Court itself, the precise point and bearing of which is often brought out more strongly in the light of the dissenting judgments. In addition, the latter often clarify subsidiary points of interest and importance which were not dealt with in the judgment of the Court because not directly necessary for the purpose of its findings.

82. For these reasons we would not only preserve the system of dissenting judgments, but go further than the relevant provision of the existing Statute, which only confers a right on dissenting Judges to deliver a separate opinion. In our view it should be obligatory on any Judge who dissents from the majority to state his reasons for so doing. There would of course be nothing to prevent two or more dissenting Judges from agreeing on a common opinion".

It cannot be seen that the International Commission of Jurists meeting in Washington or the San Francisco Conference added anything to this.

IX.

The International Court of Justice has until the end of 1955 given 15 judgments of which 5 were on preliminary questions. Out of these one judg-

ment on the merits⁵⁷⁾ and two on preliminary questions⁵⁸⁾ have been unanimous. The Court has given 8 advisory opinions and not one of them has been unanimous. Furthermore the dissenting and individual opinions of the individual members of the Court have taken up more space than the majority opinions and judgments. Some 780 pages as against 410^{58a)}. It would, therefore, seem that the difficulties to reach decisions must be considerably greater after the second world war than it was after the first world war.

Also the tone of the dissents has tended to be bitter and full of criticism instead of objective and judicial as in the first Court⁵⁹⁾.

One judge stated in one judgment that the Court's conclusions "seem to be ill-founded"⁶⁰⁾. Another judge states that "The Court advances the strange argument"⁶¹⁾. A third judge states that "the Court has not endeavoured to discover"⁶²⁾, whereas a fourth judge says that his colleagues have "not born in mind"⁶³⁾ certain factors. In one case a judge, in a spirit of self congratulation says about his own minority view that it is "clearly demonstrated"⁶⁴⁾ and another judge found his dissenting result "beyond doubt"⁶⁵⁾. Several judges together found that there was "no trace of any authority"⁶⁶⁾ for the opinion of the Court whereas one member talked of "very debatable conclusions"⁶⁷⁾ of the Court.

These utterances are regrettable, but are not in themselves very dangerous for the Court. They are mild compared with the tone in the political assem-

⁵⁷⁾ The *Minquiers and Ecrehous Case*, I.C.J. Reports 1953, p. 47 ff.

⁵⁸⁾ *Nottebohm Case*, I.C.J. Reports 1953, p. 111 ff. and *The Monetary Gold Case*, I.C.J. Reports 1954, p. 19 ff.

^{58a)} If anybody should feel that it might be wiser not to express a personal view too often or at great length, he may take comfort from Lord Atkin's statement (as quoted in 39 *Grotius Society*, p. 134) that a judge needs "silence, patience and if possible some slight knowledge of the law".

After this article was written, the Court has on June first, 1956 given an advisory opinion about the admissibility of the hearing of petitioners by the Commission on South West Africa (I.C.J. Reports 1956, p. 23 ff.). The opinion of the Court amounted to 12 pages and the dissenters used 38 pages. The figures are, therefore, 818 pages for dissenters and 422 for the Court.

⁵⁹⁾ See Judge Manley O. Hudson's warning on this score in his article "The Twentyeight Year of the World Court", 44 *American Journal* (1950), p. 18-21.

⁶⁰⁾ Judge Ečer (Albanian *ad hoc*) I.C.J. Reports 1949, p. 122.

⁶¹⁾ Judge Hackworth, I.C.J. Reports 1949, p. 199.

⁶²⁾ Judge Badawi (Pasha as he then was), I.C.J. Reports 1949, p. 208.

⁶³⁾ Judge Krylov, I.C.J. Reports 1949, p. 219.

⁶⁴⁾ Judge Krylov, I.C.J. Reports 1950, p. 191.

⁶⁵⁾ Judge Zoričić, *Ibidem* 1950, p. 100.

⁶⁶⁾ Judges Guerrero, McNair, Hsu Mo and Read, I.C.J. Reports 1951, p. 42.

⁶⁷⁾ Judge Caicedo Castilla (Columbian Judge *ad hoc*), I.C.J. Reports 1950, p. 360.

blies. There is a general decline in courtesy and good manners in public life which perhaps – regrettable though it may be – has penetrated even into the Peace Palace. In a minor way they diminish the prestige of the Court and it lowers the persuasive authority of the judgments and opinions of the Court. When even members of the bench think so little of the work of their colleagues, how can other people refrain from criticism.

However, such language is only the froth on the top. There must be more deep seated causes for the continual disagreements within the Court.

X.

It has already been tentatively stated that only difficult cases come before the Court. It is to be expected that opinions differ even within the Courts. It is not the possibility of making a dissenting opinion which creates the disagreement. Three cases before the Permanent Court will tend to show this. The first is the advisory opinion in the Case concerning Eastern Carelia ⁶⁸⁾ the first case where the Court was seriously split on an advisory opinion. The reason was that the question went to the very root of the character of the advisory task of the Court. This case was distinguished by the International Court in the Peace Treaties Case, and it may well be that it was easier for the members of the International Court to change the practice of the Court in this respect since there was a dissent in the Carelia Case ⁶⁹⁾. The second case that may serve as an illustration is the Lotus Case ⁷⁰⁾ where the Court was split wide open. It is believed that this judgment helped to show how very unsatisfactory international law was on that particular point concerning extension of national competence to crimes on the high seas and helped to pave the way for certain improvements in practice ⁷¹⁾. The third case to be mentioned is the Advisory Case concerning the Austro-German Customs-Union ⁷²⁾. It might well have been unfortunate to saddle the Court with such a political issue. It is believed that most issues are at the same time political and legal and that all issues may be settled by the process of law, but it is believed that certain issues are of such a character that a legal treatment alone will not bring any satisfactory results and that an appeal to law may only tend to bring the courts into disrepute by mixing up with politics. It is very difficult, indeed, to know when this is the

⁶⁸⁾ P.C.I.J., Ser. B No. 5. For literature see H a m b r o, Case Law, p. 502, Nos. 518/22.

⁶⁹⁾ I.C.J. Reports 1950, p. 65 ff. and p. 221 ff. For literature see H a m b r o, l. c., p. 570, Nos. 1567 to 1577.

⁷⁰⁾ P.C.I.J., Ser. A No. 10. For literature see H a m b r o, l. c., p. 509, Nos. 635/85.

⁷¹⁾ See O p p e n h e i m - L a u t e r p a c h t, 8th ed., Vol. I, p. 333 ff.

⁷²⁾ P.C.I.J., Ser. A/B No. 41. For literature see H a m b r o, l. c., p. 518, Nos. 804/73.

case and it is perhaps one of the most difficult problems facing international law today to decide when a particular field of law may be deemed ripe for that particular kind of crystallisation which an appeal to the courts may achieve ⁷³).

It is believed that the Court will split – to put it in its simplest form – when the law is fluid or when the issue is too much tainted with political controversy. In most cases of this nature, it is probably true that the questions in issue are both uncertain and politically important.

A few of the cases before the International Court of Justice will – it is believed – substantiate this view. The first important case which split the Court was the Advisory Case on conditions of membership in the United Nations ⁷⁴) where there was a seeming majority of 9 to 6 in the Court. Closer scrutiny will prove, however, that two of those who appended individual opinions to the advisory opinion ⁷⁵) in reality took the minority view so that the majority of 9 in reality was a minority of 7 ⁷⁶). It was, therefore, quite clear that this opinion could not have any great effect ⁷⁷) and that the formal adoption by the General Assembly had no meaning. The Assembly never acted according to the majority and the difficulties inherent in admission of members were not solved before the packet deal in 1955 ⁷⁸). This opinion shows how unwise it is to demand opinions on highly controversial subjects of great political importance ⁷⁹); and nearly all the opinions emanating from the General Assembly have been requested in the teeth of sharp opposition ⁸⁰). Another advisory opinion which was bound to have no great importance was the one on Reservations to the Genocide Convention ⁸¹)

⁷³) I have myself recently treated this subject in Chapter XI in my book (In Norwegian), *Folkerettspleie*, Oslo 1956. See in particular *Oppenheim-Lauterpacht*, Vol. II, § 1 with bibliography, Charles De Visscher, *Théories et Réalités en Droit international public*, Paris 1953, 2^e éd. 1955; *Wengler, Vom Begriff des Politischen*, Tübingen 1956.

⁷⁴) I.C.J. Reports 1947–1948, p. 57 ff. For literature see *Hambro*, l. c., p. 562, Nos. 1458/83.

⁷⁵) *Alvarez and Azevedo*.

⁷⁶) This was pointed out by Mr. *Vichinsky* in the meetings of the Special Political Committee of the General Assembly in 1948, p. 67.

⁷⁷) I have treated this questions previously in my article (under the pen name "Humber") in *British Year Book of International Law*, 1947, p. 90 ff.

⁷⁸) See on the whole on the reception of advisory opinions my article in the *International and Comparative Law Quarterly* 1954, p. 2 ff.

⁷⁹) This question in its technical aspect has recently been discussed by the *Institut de Droit international* on the basis of a report by *Wengler*. See *Annuaire de l'Institut* 1944, I, p. 224 ff. and 1945, I, p. 272 ff.

⁸⁰) See for a short summary of this problem, *Hambro*, 76, *Recueil*, 1950, I, p. 167 ff. and in 23, *British Year Book of International Law*, 1946, 54 ff. (under the pen name "Pollux").

⁸¹) I.C.J. Reports 1951, p. 15 ff. For literature see *Hambro*, *Case Law*, p. 575, Nos. 1637/56 and subsequent bibliographies in the *Year Books of the Court*.

because the state of international law itself was unsatisfactory on this point ⁸²⁾, and it is believed that fundamentally the same remark applies to the three judgments in the Asylum (Haya de la Torre) Case ⁸³⁾.

It is believed that there is in this respect no real difference between the Permanent Court and the International Court of Justice.

The difference is in degree and not in substance. It is true that the first world war created a revolution in the organisation of the world. But in spite of the fact that three great empires disappeared and the League of Nations was created, the world still built on State sovereignty and approximately on the same members of the society of nations as before. And those members of the world society which adhered to radically different principles (the U.S.S.R.) were not parties to the Statute of the Court. The centre of gravity still seemed to be in Europe.

After the second world war the picture changed radically. First of all the world organisation has grown to such an extent that the world is hardly recognizable. This fact must be taken into consideration in increasing measure by international lawyers ⁸⁴⁾. Secondly the composition of the community of nations has also changed beyond recognition. States that were formally on the outer frontiers in this respect have taken the center of the stage. The Soviet Union and China have become recognized Great Powers. Many of the former colonies have become independent States, and States that were formerly semi colonial have grown in stature and power. It would indeed be strange if these changes should not be reflected in international law and in the International Court of Justice.

Judge A l v a r e z , who has delivered more dissenting and individual opinions than any other judge, has appointed himself the great prophet of the new international law ⁸⁵⁾. His colleagues from Latin America have been far from silent. It is no coincidence that the judges from the U.S.S.R. and the other "Eastern" countries so often deliver dissenting opinions.

The center of gravity has changed. It is to be hoped that some kind of integration eventually will take place and that a new unity of international law will emerge. But until that happens no one with a realistic conception of international law can expect unanimous decisions of the Court.

⁸²⁾ See Oppenheim-Lauterpacht, § 517 a.

⁸³⁾ I.C.J. Reports 1950, p. 266 ff., 395 ff.; 1951, p. 71 ff. For literature see H a m b r o , l. c., p. 573, Nos. 1609/18 and 1664/71 and subsequent issues of the Court's Year Book.

⁸⁴⁾ See J e n k s most stimulating article about "The Scope of International Law" in 31, British Year Book of International Law, 1954, p. 1 ff.

⁸⁵⁾ Madame Suzanne Bastid has given a whole course at Paris University on Le droit international nouveau et la jurisprudence de la Cour internationale de Justice.

It is believed that it is not so much the technique of the Court that is at fault⁸⁶⁾ as the basic uncertainty of international law at the present time.

Article 9 of the Statute provides about the Court "that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured". And if that is the case, it is to be expected that the Court as a whole should reflect some of the conflicts between these forms of civilization. The struggle on the political plane must be seen in the Court. That does not mean that the judges act as politicians, but it does mean that there is no hard and fast line between law and politics. It means that there are fields of law which are not yet settled and the judges must lay down a rule. They must to some extent act as legislators. How can they do that without being influenced by their form of civilization and the legal system under which they have lived?

XI.

The conclusion to be drawn from these pages would seem to be first of all that the whole problem is somewhat academic. There has been sharp conflict about the wisdom of open dissent within the International Court of Justice, but every time since 1920 when the topic has been discussed on the highest level, the result has been to keep the right of public dissent. It will undoubtedly be felt unwise to suppress an institution which has already taken root. It should also be added that the judges themselves attach the greatest importance to their freedom in this respect⁸⁷⁾.

It is undoubtedly true that the possibility of a dissent may induce the members of the majority to marshal all their arguments so that the majority should not appear to be weaker than the minority. However, this advantage is to some extent outweighed by the danger that the same majority may try to combat the minority by using arguments from the dissenting judge which may not always have been well enough considered and which, even though an *obiter dictum*, may be dangerous on this particular score like the absolute statement in the Greenland Case about the binding character of an oral promise given by the Foreign Minister⁸⁸⁾.

⁸⁶⁾ A short description of that technique with bibliographical references can be found in H a m b r o , The Reasons behind the Decisions of the International Court of Justice, in 7, Current Legal Problems, 1954, p. 212 ff.

⁸⁷⁾ The present writer has heard a judge state that he would rather retire from the Court than forego this privilege.

⁸⁸⁾ I have recently treated this problem in an article entitled "The Ihlen Declaration Revisited" in Festschrift für Professor Spiropoulos and in Norwegian, „Gjensyn med Ihlen Erklæringen" to be published shortly in Nordisk Tidsskrift for International Ret.

Another danger is that the dissents if they openly criticize the majority and indulge in polemics may weaken the authority of the majority pronouncements and detract from the dignity of the Court. This, however, is a mere detail of form.

It would, on balance, seem that the whole problem is of secondary interest. The frequent dissents within the Court are but a reflex of the unsettled state of international law in a period of transition. The dissents are a symptom, not a cause. The best that can be said about them is that they help in an objective and authoritative way to draw attention to the fact that the law is not wholly satisfactory⁸⁹⁾. By doing this in an orderly and dignified way, the dissenting and individual opinions may help to bridge the gap between the law of yesterday and tomorrow.

This may seem an oddly negative and rather meagre result of an article. However, it is believed that the question of dissents has preoccupied the minds of so many students of the Court – the present writer among them – that it would be useful to re-examine the problem in order to put it aside or anyhow to see it in its right perspective.

⁸⁹⁾ There is no necessity to quote many authors to illustrate this point. It is enough to mention Georg Schwarzenberger's *Power Politics*, Second Edition London 1951, as well as Brierly, *The Outlook for International Law*, and Smith, *The Crisis in the Law of Nations*.