Judges ad hoc in Advisory Proceedings

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The admission of judges *ad hoc* in proceedings concerning a request for an advisory opinion was a highly controverted question in the formative years of the Permanent Court of International Justice. In several cases the Permanent Court admitted judges *ad hoc* in advisory proceedings and in three others it refused the request for their appointment.

In the International Court of Justice this particular question was not raised for a long period, since no requests were made for the appointment of a judge *ad hoc* in advisory proceedings. The matter arose for the first time in connection with the advisory opinion delivered by the Court on 21 June 1971, at the request of the Security Council, on the "*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*".

In this advisory case the Government of South Africa filed an application for the appointment of a judge *ad hoc* to sit in the proceedings. The Court, by ten votes to five, rejected the application.

In this way, the legal problems involved in this question again became of practical interest, in view of the reasons invoked by the Court for the rejection, and those contained in some of the separate and dissenting opinions in favour of accepting South Africa's application.

In a volume designed to commemorate the existence of the World Court for over half a century, it may be of interest to examine the Permanent Court precedents on this question and to compare them with the recent decision of the International Court of Justice.

The present study will therefore be divided in two parts:

I. The practice of the Permanent Court of International Justice on the subject. II. The recent decision of the International Court of Justice on the subject.

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I. The Practice of the Permanent Court of International Justice

The institution of judges *ad hoc* in the Statute of the Court is a corollary of the basic principle of the equality of the parties before the Court; a principle which "follows from the requirements of good administration of justice"[1]).

The 1920 Committee of Jurists which drafted the Statute — an international instrument which has successfully withstood half a century of application — had to deal with a difficult problem: what to do when only one of the two parties has a judge of its nationality in the Bench. There were two alternative systems by which the necessary equality between the two parties could be preserved: by way of addition or by way of subtraction. Either the regular judge who was a national of one of the parties could not participate in the deliberation and decision of the case or the other party should be allowed to appoint a judge *ad hoc* for that particular case.

The second alternative was adopted in the Statute with full knowledge that this solution had been described as undesirable because, by allowing the parties to influence the composition of the Court, it introduced in the judicial organ a feature characteristic of courts of arbitration. "A Court whose sole duty is to administer justice would gain nothing by the representation in its deliberations, through judges appointed by the Parties themselves, of national interests which are outside the domain of law"[2]).

However, those objections were not maintained in the final discussions: the formula agreed by the Advisory Committee of Jurists was approved unanimously in the League Assembly and preserved in the present Statute. This was not merely a concession to the middle and small Powers: none of the great Powers, then insistent in having at all times one of their nationals on the Bench, suggested that it would be prepared to accept that the judge of its nationality should not sit in a case in which that Power was a party before the Court. Such an abstention would be the indispensable *quid pro quo* for achieving the often suggested abolition of judges *ad hoc*.

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[1]) I.C.J. Reports 1956, p. 86.

[2]) Swedish Amendments to the draft Scheme — Document 27 in League of Nations Permanent Court of International Justice, Documents concerning the action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court, Geneva, 1921, p. 36.

1. The proposals of The Hague Committee of Jurists concerning advisory proceedings

Article 36 of the Committee of Jurists draft proposed that when the Court gave an advisory opinion on a question of international law, independently of an already existing dispute, it should set up a special Chamber of three to five judges and that when the opinion was upon a question constituting an already existing dispute, the Court should decide under the same conditions as if it had to deal with a dispute before it. As indicated by the Rapporteur, M. de Lapradelle, this meant that, in the latter case, "a judge of the nationality of each of the contesting parties must be allowed to take his place on the Bench, if the parties request it"[3]).

2. Action of the League of Nations Assembly

The League of Nations Assembly, acting upon the advice of a special sub-committee of ten jurists, five of whom had been members of the Advisory Committee of Jurists, deleted Article 36 which had been proposed by The Hague Committee.

The reasons for this deletion, as explained by the sub-committee, were that advisory "opinions should, in every case, be given with the same quorum of judges as that required for the decision of disputes, and that there is no need to maintain the distinction established in this respect by the draft scheme between the cases where a question submitted to the Court is the subject of a dispute which has actually arisen, and where there is no existing dispute. This distinction seemed lacking in clearness and likely to give rise to practical difficulties".

The sub-committee was further of the opinion that "the draft here entered into details which concerned rather the rules of procedure of the Court"[4]).

3. Practice of the Permanent Court prior to 1927

As a consequence of the suppression of Article 36 there was no provision in the Statute as adopted in 1920 referring specifically to advisory opinions. There was nothing in particular expressly indicating whether the provisions concerning judges *ad hoc* could apply in the case of a request for an advisory opinion relating to a dispute between two States, and it was apparently left to the Court to determine whether they did.

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[3]) Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, The Hague 1920, p. 731.

[4]) Compilation of documents referred to in note 3, p. 211.

The Court had recognized in regard to the cases concerning *Nationality Decrees issued in Tunis and Morocco* and the *Status of Eastern Carelia* that an advisory opinion might concern a dispute between States. However, the question of a judge *ad hoc* as a remedy to the inequality of the parties before the Court did not arise in these two cases, since in the former both of the interested States had a judge and in the latter neither had one. Likewise, in the advisory proceedings concerning the *Exchange of Greek and Turkish Populations*, neither of the interested States had a judge of their nationality at the Court. In this case the Government of Turkey communicated the appointment of a national judge, and in reply it was stated on behalf of the President that Article 31 did not apply to advisory procedure.

In 1925 the question arose whether, for the purpose of the Advisory Opinion in the case concerning the *Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne* (the *Mosul* case), Turkey should be invited to appoint a judge *ad hoc*, since the other interested party, Great Britain, had a judge upon the Bench. The Court, without prejudice to the question of amending the Rules, decided not to modify the practice followed up to that date and sat only with the judges present.

4. Discussion in connection with the 1926 revision of the Rules

In the light of this experience, in the 1926 revision of the Rules Judges Huber and Anzilotti proposed to add a specific provision in the Rules allowing judges *ad hoc* in advisory procedure in contingencies such as the one which had arisen in the *Mosul* case.

President Huber observed that the Statute "had been construed as meaning that national judges were not allowed in advisory procedure. It seemed, however, to the President that, as the principle of the equality of the parties was the principle most essential in any procedure, when proceedings for advisory opinion were substantially equivalent to a contested case, it was very difficult to set aside the rules applicable to the latter without a definite provision to that effect"[5]).

These proposals were opposed by a majority of the judges. Judge de Bustamante raised "a question of a constitutional nature. Since the Statute only spoke of national judges in contentious proceedings, could the Court really extend the scope of the Statute by introducing into advisory procedure a right on the part of States to appoint judges *ad hoc*?"[6]). This

[5]) P.C.I.J., Series D, No. 2, Addendum, p. 186.
[6]) *Ibid.*

argument was supported by Judge Loder who remarked that "Article 31 of the Statute, which only referred to contentious procedure, made provision, in that procedure, for an exception to the normal composition of the Court. That Article... must therefore be strictly construed and not read to mean more than it actually said, in order to cover advisory opinions. The Court had no right to alter its own composition as laid down by the Statute" [7]). Judge Weiss shared Judge de Bustamante's constitutional objection. "The Court's right to give advisory opinions was derived from Article 14 of the Covenant ... That clause referred to the Court with the normal composition provided for in the Statute. The Court could add nothing to that composition" [8]). Judge Oda also joined in these objections [9]).

Judges Anzilotti and Huber answered this constitutional objection attacking, not the argument itself, but the premise upon which it was based: namely, that Article 31 only applied to contentious procedure.

Judge Anzilotti recalled, alluding to the *Mosul* case, that "there had been cases in which the Court had applied, in advisory procedure, the first paragraph of Article 31 to the effect that 'judges of the nationality of each contesting party shall retain their right to sit in the case before the Court'... all that followed in Article 31 was connected with the same general principle which related to the manner in which the 'full Court' mentioned in Article 25 was to be understood" [10]).

And President Huber pointed out that "the Court's Statute, which was based on Article 14 of the Covenant, contained three chapters: Organization, Jurisdiction, Procedure. As regards the third Chapter, only contentious procedure was dealt with. The Chapter on Jurisdiction was not relevant here. There remained the Chapter regarding the Court's Organization: this Chapter by no means referred to contentious procedure alone. It included Article 31 as well as Article 25. In regulating advisory procedure, the Court should base itself on the Chapter 'Organization' as a whole. It was clear, therefore, that Article 31 was not necessarily confined to contentious procedure" [11]).

Despite these cogent observations, the proposed addition was rejected, the majority of the Court being of the opinion that "Article 31 of the Statute was not applicable to advisory procedure" [12]).

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[7]) *Ibid.*, pp. 186—187.
[8]) *Ibid.*, p. 187.
[9]) *Ibid.*, p. 188.
[10]) *Ibid.*, p. 189.
[11]) *Ibid.*, p. 190.
[12]) P.C.I.J., Series E, No. 3, p. 224.

5. Judge Anzilotti's renewed proposal in 1927

After this discussion, the Court had to deliver its advisory opinion in the case concerning the *Jurisdiction of the European Commission of the Danube*[13]). This concerned a dispute between Great Britain, France and Italy on the one hand and Romania on the other. On the Court as first constituted were the British, French and Italian judges, but not the Romanian deputy-judge. However, the French judge was unable to sit and he was replaced by Romanian deputy-Judge Negulesco. Thus "chance ... solved the difficulty through the absence of a regular judge and the summoning of a deputy-judge from the country that was previously unrepresented"[14]). Considering that "the solution of a matter of such far reaching importance should not, however, be left to chance"[15]), Judge Anzilotti, on 1 September 1927, again proposed the addition to the Rules of a provision allowing judges *ad hoc* in advisory proceedings. This was to be permitted when the question submitted to the Court related "to an existing dispute between two or more States"[16]). He said that it was desirable to raise this question at a time when no affair for advisory opinion was actually pending before the Court. Again Judges Loder, Oda and de Bustamante opposed the proposal[17]). Judge Loder insisted in his argument that "the provision of Article 31 of the Statute, which was an exception to the rule providing that the full Court should consist of eleven judges, must be strictly construed"[18]). In reply, President Huber again made the point that "the terms of the Statute itself demanded that the change should be made, for the whole of Chapter I of that document, relating as it did, to the 'organization of the Court', no doubt was intended to provide for this organization in all contingencies: but Article 31 was included in that Chapter. This identical proposal had actually been made by the Committee of Jurists of 1920 and was only rejected by the Assembly when that body decided to omit from the Statute all provisions regarding advisory opinions"[19]).

A Committee constituted by Judges Loder, Moore and Anzilotti was appointed to report to the Court whether the technical objection raised by Judge Loder really formed an obstacle to any change[20]).

[13]) P.C.I.J., Series B, No. 14.
[14]) P.C.I.J., Series E, No. 4, p. 77.
[15]) *Loc. cit.*
[16]) P.C.I.J., Series E, No. 4, p. 73.
[17]) *Ibid.*, p. 74.
[18]) *Loc. cit.*
[19]) *Loc. cit.*
[20]) *Loc. cit.*

6. The unanimous report of the Committee

The Committee of three judges submitted a unanimous report in favour of the change. This report, which in substance and style is a remarkable document, points out that "equality as regards national representation in the Court" is one of the principles incorporated in the Statute. "It being conceded that equality in the matter was essential, there were two ways of assuring it. These were, either by making allegiance a disqualification, or by placing the parties on an even footing. The Statute (Article 31) chose the latter"[21]).

The Report points out that "The Statute does not mention advisory opinions, but leaves to the Court the entire regulation of its procedure in the matter. The Court, in the exercise of this power, deliberately and advisedly assimilated its advisory procedure to its contentious procedure"[22]).

Coming then to the key point of the relationship between Articles 25 and 31 of the Statute, the Report states: "At this point, it is important to refer to Article 25 of the Statute, which provides that the full Court shall sit except when the Statute otherwise provides. The Court has applied this article to advisory procedure, and has accordingly, in advisory cases, summoned deputy-judges to take the places of judges who could not attend. It has done this on the principle that, although advisory opinions are not expressly mentioned in the Statute, the Court, as impliedly empowered by the Statute to give such opinions, is the Court as constituted under the Statute to deal with contentious cases. Certainly there is no warrant in the Statute for any other view; and, this being so, it is evident that there is a vital connection between Article 25 and Article 31. For, if the Court that deals with contentious cases is also the Court that deals with requests for advisory opinions, then this Court must violate Article 31, if, seeing before it, in an advisory proceeding, contesting parties, one of which has on the Court a judge of its nationality, it refuses the request of the other party to be similarly represented"[23]).

7. The Rule adopted in 1927 and its application

The document was presented to the Court by Judge Loder who stated "that he had nothing to add to the arguments and conclusions of that report in which he fully concurred". Judges Weiss and Oda also stated their concurrence; the latter declaring that "after perusing the Com-

[21]) *Ibid.*, p. 75.
[22]) *Ibid.*, p. 76.
[23]) *Loc. cit.*

mittee's report, he now accepted the Committee's opinion and abandoned the view he had previously held". Judge Anzilotti's proposal was adopted by nine votes to two, Judges Altamira and de Bustamante voting against[24]).

The first occasion on which this new Rule was applied was in connection with the advisory opinion requested by the League Council concerning the *Jurisdiction of the Courts of Danzig*. Not only Poland, but the Free City of Danzig also (which, since 1922, had been recognized as a juridical personality capable of appearing before the Court) were entitled to appoint a judge *ad hoc*, and the two Governments were notified accordingly[25]).

Judges *ad hoc* were appointed by the Permanent Court in a number of advisory cases: *Jurisdiction of the Courts of Danzig*[26]); *Greco-Bulgarian "Communities"*[27]); *Railway Traffic between Lithuania and Poland*[28]); *Polish War Vessels in the Port of Danzig*[29]); *Treatment of Polish Nationals in Danzig*[30]). In the *Greco-Turkish-Agreement (Final Protocol)* case, the two States waived their right to appoint judges *ad hoc*[31]).

8. Refusal of appointment of judges *ad hoc* by the Permanent Court

Applications for the appointment of judges *ad hoc* were refused by the Permanent Court in the *Minority Schools in Albania*[32]), *Austro-German Customs Régime*[33]) and *Danzig Legislative Decrees*[34]) cases.

In the *Minority Schools in Albania* case the Registrar sent to two States only, Albania and Greece, the special and direct communication required then by the Rules and now provided for in Article 66 of the Statute. Those two States were considered by the President — the Court not being in session — as likely to be able to furnish information on the question referred to the Court for advisory opinion. The written and oral proceedings took place as if that case was a dispute between these two opposing parties. The

[24]) *Ibid.*, p. 77.
[25]) *Ibid.*, p. 296.
[26]) P.C.I.J., Series B, No. 15, p. 4.
[27]) P.C.I.J., Series B, No. 17, p. 4.
[28]) P.C.I.J., Series A/B, No. 42, p. 108.
[29]) P.C.I.J., Series A/B, No. 43, p. 128.
[30]) P.C.I.J., Series A/B, No. 44, p. 4.
[31]) P.C.I.J., Series C, No. 15-1, pp. 229, 231; Series E, No. 5, p. 262.
[32]) P.C.I.J., Series A/B, No. 64, p. 4.
[33]) P.C.I.J., Series A/B, No. 41, p. 88.
[34]) P.C.I.J., Series A/B, No. 65, p. 69.

views of both States were ascertained with regard to the procedure and time-limits to be adopted; their written statements were described by the Court as the Albanian and Greek Memorial respectively. In the hearings, information was presented only by Counsel from those two States, Professor Gidel acting as Counsel for the Albanian Government and M. Politis as the main Counsel for the Greek Government.

However, the Court declared on the question of the admission of judges *ad hoc:* "The Court being satisfied that the question submitted to it for advisory opinion did not relate to an existing dispute, the second paragraph of Article 71 of the Rules, concerning the appointment of judges in accordance with Article 31 of the Statute, was not applicable"[35]).

In the *Austro-German Customs Régime* case applications were received from the Governments of Austria and Czechoslovakia for the appointment of judges *ad hoc.* After granting a hearing to the interested States the Court decided, on the same day, after deliberating, that there was no ground for the appointment of the judges *ad hoc* requested. The reason for the refusal was that there were already on the Bench judges of the nationality of States which were "in the same interest" as the requesting States. Therefore, under paragraph 5 of Article 31 of the Statute, they should "be reckoned as one party only". The refusal of the Austrian judge *ad hoc* gave rise to a dissent by five judges, Anzilotti being among them. This refusal was of decisive importance for the outcome of the case. As indicated by Professor Verzijl in his commentary on this case, the acceptance of the Austrian *ad hoc* judge "would have turned the balance in favour of the Austro-German point of view"[36]).

9. Refusal in the Danzig Legislative Decrees case

In the case concerning the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City,* the Free City of Danzig asked the Court to authorize it to appoint a judge *ad hoc.*

In the request it was recognized that "under Article 71 of the Rules [of Court], an appointment of this kind is only expressly provided for in the case of a dispute between several States or Members of the League of Nations".

In oral argument in support of this request, the Agent for Danzig invoked the discretionary powers enjoyed by the Court with respect to advisory procedure[37]).

[35]) P.C.I.J., Series A/B, No. 64, p. 6.
[36]) The Jurisprudence of the World Court (Leyden 1965), vol. 1, p. 260.
[37]) P.C.I.J., Series C, Pleadings, No. 77, pp. 177—179.

The Court, however, on the following day, unanimously reached a negative conclusion, based on the following reasoning:

"Whereas the decision of the Court must be in accordance with its Statute and with the Rules duly framed by it in pursuance of Article 30 of the Statute;

Whereas the constitution of the Court is governed by Articles 25 and 31 of the Statute; and as under the said Article 31 provision is made for the presence on the Bench in certain contingencies of judges *ad hoc* only in cases in which there are parties before the Court;

Whereas this condition is not fulfilled in the present case;

Whereas, under Article 71, first paragraph, of the Rules, advisory opinions are given by the full Court composed as provided in Article 25 of the Statute;

Whereas the Court, in accordance with the above-mentioned Article 30 of the Statute has, by Article 71, paragraph 2, of its Rules, made the provisions of Article 31 of the Statute regarding the appointment of judges *ad hoc* in certain contingencies applicable in advisory proceedings, but only in cases where such proceedings relate to an existing dispute between two or more States or Members of the League of Nations, as was, moreover, recalled by the Court in its Advisory Opinion of April 6th, 1935, in the case concerning the Minority Schools in Albania;

Whereas the second paragraph of the said Article 71 at present constitutes the only exception to the general rule, and as therefore this exception cannot be given a wider application than is provided for by the Rules;

For these reasons,

The Court

decides that there is no ground for granting the request of the Free City for permission to appoint a judge *ad hoc* in the present case" [38]).

II. The Recent Practice of the International Court of Justice

By an Order issued by the Court on 29 January 1971 the application made by the Government of South Africa for the appointment of a judge *ad hoc* in the *Namibia* case was denied. The Order of 29 January 1971 did not indicate the grounds for this decision. Three of the dissenting judges declared that they were "unable to concur in the decision to reject embodied in the Order, for reasons which we reserve the right to make known at a later opportunity, inasmuch as the present question is, from certain aspects, related to the substance of the matter on which an advisory opinion has been requested of the Court"[39]).

[38]) Order of 31 October 1935, P.C.I.J., Series A/B, No. 65, pp. 70—71.

[39]) I.C.J. Reports 1971, pp. 13—14.

In previous instances of rejection of an application for a judge *ad hoc*, the Permanent Court had likewise refrained from stating the grounds for refusal until the actual delivery of the advisory opinion. In the *Minority Schools in Albania* case, the reasons for the refusal were inserted in the preamble or recitals of the Advisory Opinion itself[40]). In the *Austro-German Customs Régime* case and in the *Danzig Legislative Decrees* case, the decision was announced as soon as adopted, but the grounds for refusal were developed in separate Orders. Those Orders were not communicated to the parties nor published until the delivery of the Advisory Opinion to which they were annexed[41]).

In the *Namibia* case the Court explained the reasons for the refusal in the text of the Advisory Opinion[42]). Finding that the opinion had not been "requested upon a legal question actually pending between two or more States", the Court concluded that South Africa "was not entitled under Article 83 of the Rules of Court to the appointment of a judge *ad hoc*"[43]).

Judges Sir Gerald Fitzmaurice, Gros and Petrén disagreed with this conclusion and explained the reasons for their dissent in the separate or dissenting opinions which they appended to the Advisory Opinion of the Court[44]).

1. The invocation of Article 68 of the Statute

Judges Onyeama and Dillard also appended a dissent to the Order of 29 January 1971 for the following reason: "While we do not think that under Article 83 of the Rules of Court the Republic of South Africa has established the right to designate a judge *ad hoc*, we are satisfied that the discretionary power vested in the Court under Article 68 of its Statute permits it to approve such designation and that it would have been appropriate to have exercised this discretionary power in view of the special interest of the Republic of South Africa in the question before the Court"[45]).

This argument is also developed in the dissenting opinion of Judge Sir Gerald Fitzmaurice appended to the Advisory Opinion of 21 June 1971. Judge Fitzmaurice states: "in my view the matter is not exclusively

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[40]) P.C.I.J., Series A/B, No. 64, p. 6.

[41]) P.C.I.J., Series A/B, No. 41, pp. 41 and 90, and P.C.I.J., Series A/B, No. 65, pp. 44 and 69.

[42]) I.C.J. Reports 1971, p. 24 (paras. 32—34).

[43]) *Ibid.*, pp. 24-25 (para. 35).

[44]) I.C.J. Reports 1971, pp. 129—130; pp. 313—316; pp. 324—330.

[45]) *Ibid.*, p. 14.

governed by the provisions of Article 83 of the Rules, which I consider do not exhaust the Court's power to allow the appointment of a judge *ad hoc*"[46]).

Referring to Article 68 of the Statute, Judge Sir Gerald Fitzmaurice adds: "This provision of course covers Article 31 of the Statute, and hence confers on the Court a general power to apply that Article by allowing the appointment of a judge *ad hoc* if requested. Furthermore, the provisions of the Rules are subordinated to those of the Statute"[47]).

2. Does the Court possess discretion with respect to the appointment of judges *ad hoc?*

In the light of the foregoing study of the past practice of the Permanent Court it is not by any means certain that the Court possesses the alleged discretionary power of admitting a judge *ad hoc* in the absence of the conditions established in Article 31 of the Statute, as interpreted and defined by Article 83 of the Rules. It is also open to question whether, as asserted, Article 68 of the Statute covers Article 31 of this same instrument.

Article 68 of the Statute gives the Court discretion and latitude to „be guided" by "the provisions of the present Statute which apply in contentious cases". It empowers the Court to apply such provisions to advisory proceedings, by analogy, and *mutatis mutandis*, "to the extent to which it recognizes them to be applicable".

The Court is thus given by Article 68 of the Statute a wide measure of discretion in organizing the advisory procedure, not only with respect to the choice of those provisions applying in contentious cases which should serve as a guide or inspiration, but also with respect to the extent to which those provisions are to be applied by analogy.

The present Court has indicated that the application of Article 68 "depends on the particular circumstances of each case... the Court possesses a large amount of discretion in the matter"[48]). In the *Reservations* case the Court added: "Article 68 of the Statute recognizes that the Court has the power to decide to what extent the circumstances of each case must lead it to apply to advisory proceedings the provisions of the Statute which apply in contentious cases"[49]).

Such a wide discretionary power must, by its very nature, be considered

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[46]) *Ibid.*, p. 309.
[47]) *Ibid.*, p. 310.
[48]) I.C.J. Reports 1950, p. 72.
[49]) I.C.J. Reports 1951, p. 19.

to be of an exceptional character, not susceptible therefore of being enlarged by an extensive interpretation. This power is conferred with respect to those provisions of the Statute which apply only in contentious cases. It cannot be claimed that the Court enjoys the same latitude with regard to those statutory provisions which are, under the Statute, directly applicable, *ex proprio vigore*, to advisory proceedings. For instance, it cannot be adduced that the Court enjoys the latitude to apply in advisory proceedings, or not to apply, or to apply to a limited extent, the provisions of Articles 16, 17 or 24 of the Statute, concerning incompatibilities, or those of Article 20 concerning the duty of a judge to make a solemn declaration before taking up his duties. Those provisions must be applied, and not merely serve as a guide, both in contentious and in advisory proceedings, and they must be applied to their full extent, and not "to the extent to which [the Court] recognizes them to be applicable". This is a corollary of the fact that the Court, as defined by itself, is "an institution pre-established by an international instrument defining its jurisdiction and regulating its operation"[50]).

Article 31 of the Statute, as explained with characteristic precision by Judges Huber and Anzilotti, at the time of the 1926 and 1927 discussions, does not apply merely to contentious cases. It is a provision which appears in Chapter I of the Statute ("Organization of the Court"), and is of an ambivalent character, that is to say, it applies directly, and *ex proprio vigore* both to contentious and to advisory proceedings. As with respect to Articles 16, 17, 20 or 24, the Court, when acting in advisory proceedings, does not enjoy any measure of latitude in its respect: it must "apply" these provisions, not merely "be guided" by them, and it must apply them in every case in which the precise circumstances which they define are present, and only in those circumstances.

Therefore, in every advisory case in which the Court sees before it contesting parties, and experiences the necessity of preserving their equality before the judge, the Court is both empowered and obliged to apply Article 31 of the Statute and admit one or more *ad hoc* judges. This is what the Permanent Court decided in 1927 when it adopted, in advance of any concrete case, the Rule of Procedure proposed by Judge Anzilotti, and this is what has been maintained in Article 83 of the present Rules of Court, those Rules which the Court is bound under the Statute to "frame for carrying out its functions" (Article 30 of the Statute).

If in a given case, as occurred in the *Namibia* case, the Court reaches the conclusion that the eventuality described in Article 83 of the Rules

[50]) I.C.J. Reports 1953, p. 119.

does not exist, then it does not enjoy discretion to appoint a judge *ad hoc* for reasons of convenience or preference. A judge *ad hoc,* who, under paragraph 6 of Article 31 of the Statute "take[s] part in the decision on terms of complete equality with [his] colleagues" cannot be added to the Court unless the legal conditions justifying his appointment are present. His position is entirely different to that of assessors, which the Court always has latitude to appoint in any case, in accordance with Article 30 of the Statute and Article 7 of the Rules.

3. Decision of the Court on its lack of discretionary power in this matter

In the *Namibia* case the Court, after recalling the precedent of the *Danzig Decrees* case, "came to the conclusion that it was unable to exercise discretion in this respect"[51]).

The Court based itself on the precedent unanimously established by the Permanent Court in the *Danzig Legislative Decrees* case, when it declared that the decision to appoint a judge *ad hoc* "must be in accordance with its Statute and with the Rules duly framed by it in pursuance of Article 30 of the Statute".

An attempt has been made to distinguish this precedent on the ground that the powers arising from Article 68 of the Statute did not exist in 1935 at the time of that decision[52]).

This attempted distinction fails to carry conviction for two reasons. The first is that the Court did not need the incorporation in the revised Statute of Article 68 in order to invoke and exercise discretionary powers in the regulation of advisory proceedings. As early as in 1923 the Court had referred to "the discretionary powers which it possesses in the case of Advisory Opinions"[53]). In the 1931 revision of the Rules of Court several proposals were made for inserting a provision in the Rules corresponding to that of Article 68 of the Draft Statute[54]). The Court decided, however, that "as these proposals were merely intended to embody in the Rules a practice which the Court had already observed, the Court considered that the proposals in question were not particularly urgent and could be examined together with the Rules at a subsequent session"[55]). When this exam-

[51]) I.C.J. Reports 1971, p. 27.

[52]) I.C.J. Reports 1971, Dissenting Opinion of Judge Sir Gerald Fitzmaurice, Annex, para. 24, p. 312. See also separate opinion of Judge Onyeama, pp. 140—141.

[53]) *Acquisition of Polish Nationality,* P.C.I.J., Series B, No. 7, p. 9.

[54]) P.C.I.J., Series D, 2nd Add. to No. 2, pp. 294—295.

[55]) *Ibid.,* p. 201.

ination was made prior to the 1936 revision of the Rules of Court, Article 68 was described as merely codifying the existing practice of the Court. Judge Anzilotti stated that "it merely amounted to the recognition and confirmation of the Court's practice"[56]) and the Registrar (subsequently Judge Hammarskjøld) observed that "in its work [the Court] had been able, in practice, to apply Article 68 of the revised Statute without inserting it in the Rules"[57]). Judge Van Eysinga, President of the Committee of Jurists which drafted Article 68, pointed out that "in practice, the Court already followed the guidance of that Article"[58]).

The second and decisive reason for not distinguishing the 1935 Danzig precedent is that, as explained above, Article 68 of the Statute does not cover Article 31 and therefore does not confer discretion with respect to the question of admission of judges *ad hoc* in advisory proceedings.

III. Conclusion

From the preceding study it may be concluded that the recent advisory opinion of the Court on the question of *Namibia* confirms, in the field under examination, the continuity of jurisprudence between the two World Courts and the value, for the work of the present Court, of precedents firmly established by the Permanent Court.

This authority of settled precedents corresponds to one of the main advantages which were indicated more than fifty years ago as resulting from the establishment of a permanent judicial organ: that this would permit the development of a regular and consistent jurisprudence.

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[56]) P.C.I.J., Series D, 3rd Add. to No. 2, p. 375.
[57]) *Loc. cit.*
[58]) *Ibid.*, p. 372.