

## SEPARATE OPINION BY JUDGE WINIARSKI

[*Translation*]

The advisory function of the Permanent Court of International Justice, introduced by Article 14 of the Covenant of the League of Nations, gave rise to serious doubts and grave concern on the part of the Permanent Court at the beginning of its activities, as it had on the part of jurists when the Covenant was being drafted and later when the Statute of the Court was being prepared in 1920. At the preliminary session of the Court in 1922 which was devoted to drawing up the first Rules of Court, Judge J. B. Moore began his important report on the subject in the following terms : "No subject connected with the organisation of the Permanent Court of International Justice has caused so much confusion and proved to be so baffling as the question whether and under what conditions the Court shall undertake to give 'advisory' opinions."

The important problem which the Court had to resolve was to reconcile its advisory function and its character as a Court of Justice, as an independent judicial organ of international law. On the one hand there were the Opinions, without binding force, which ought to impose themselves by virtue of the great authority attaching to them ; otherwise, as Judge Moore pointed out in his report, the prestige of the Court might be discredited. On the other hand, Article 14 provided : "The Court may also give (in French : *donnera*) an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly", which appeared to indicate that there was a possibility of introducing the compulsory jurisdiction by the circuitous means of advisory opinions : by giving an opinion on a legal question relating to an existing dispute between States, the Court would in substance be adjudicating on the dispute itself although the parties had not accepted its jurisdiction for that purpose.

The Permanent Court met this twofold danger in two ways. First, it provided the exercise of its advisory function with judicial forms and safeguards ; secondly, it recognized that it might decline to give an opinion if there were compelling reasons against its doing so, in accordance with the conclusion reached in the Moore report to the effect that if an application for an advisory opinion should be presented, "the Court should then deal with the application according to what should be found to be the nature and the merits of the case". In 1923, in the famous Opinion concerning the Status of Eastern Carelia, the Court laid down the principles which led it to decline to give the opinion requested by the Council ; these principles were summarized in the following well-known sentence : "The Court, being a Court of Justice, cannot, even in giving

Advisory Opinions, depart from the essential rules guiding it as a Court." (Opinion No. 5, p. 29.) In 1935, President Anzilotti, recalling the constant attitude of the Permanent Court, added the following idea which has lost none of its force: "It is ... difficult to see how the Court's independence of the political organs of the League of Nations could be safeguarded, if it were in the power of the Assembly or the Council to oblige the Court to answer any question which they might see fit to submit to it" (A/B 65, p. 61).

The attitude of the International Court of Justice does not differ from that of the Permanent Court. In its Opinion of March 30th, 1950, after noting that the Court's Opinion in principle should not be refused, the Court stated: "There are certain limits, however, to the Court's duty to reply to a Request for an Opinion. It is not merely an 'organ of the United Nations', it is essentially the 'principal judicial organ' of the Organization (Art. 92 of the Charter and Art. 1 of the Statute)." And further on: "Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" (pp. 71-72). On another occasion, recalling the principles thus stated, the Court said: "The permissive provision of Article 65 of the Statute recognizes that the Court has the power to decide whether the circumstances of a particular case are such as to lead the Court to decline to reply to the request for an Opinion" (Reports 1951, p. 19). The Court has not considered that the circumstances of the case now before it are such as to lead it to decline to give an answer and it is on this point that I regret I am unable to agree with the decision of the Court.

I pointed out above that from the beginning the Permanent Court provided the exercise of its advisory function with judicial forms and safeguards. In connexion with the first revision of the Rules (1926-1927) the Committee appointed by the Permanent Court and composed of Judges Loder, Moore and Anzilotti, made the following statement in its report: "The Court, in the exercise of this power, deliberately and advisedly assimilated its advisory procedure to its contentious procedure; and the results have abundantly justified its action. Such prestige as the Court to-day enjoys as a judicial tribunal is largely due to the amount of its advisory business and the judicial way in which it has dealt with such business. In reality, where there are in fact contending parties, the difference between contentious cases and advisory cases is only nominal." (Fourth Annual Report, 1927-1928, p. 76.)

At the 1929 Conference for the revision of the Statute of the Permanent Court, the following explanation was given with regard to Article 68 which had been revised and was subsequently transmitted to the Assembly: "It would be quite useless to give an advisory opinion after hearing only one side. For the opinion to be useful, both parties must be heard. It was therefore quite natural to lay

down in the Statute of the Court that, in regard to advisory opinions, the Court should proceed in all respects in the same way as in contentious cases."

The revised Statute of 1929 and the revised Rules of 1936 were the last stages in the evolution which necessarily led to considerable assimilation of the two procedures, an assimilation which was almost complete in so far as "existing" disputes between two or more States were concerned.

The position of the International Court of Justice with regard to the advisory function has remained practically the same, and although Article 65 of the Statute, in accordance with Article 96 of the Charter, has abandoned the difference between "a question" and "a dispute" in favour of a reference to "any legal question", Article 68 of the Statute has remained unchanged and Article 82 (modified) of the Rules continues to provide: "... it [the Court] shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States" in order to be guided by the provisions of the Statute and Rules which apply in contentious cases to the extent to which it recognizes them to be applicable.

In conducting its advisory activity in this way, the Court respects the principle of the independence of States by virtue of which disputes between States may not be settled without their consent, even indirectly, by means of an advisory opinion; the Court also respects two fundamental principles of procedure from which, as a judicial body, it cannot depart: *audiatur et altera pars* and the equality of the parties before a Court. The strict observance of these principles and the constant will of the Court to be fully enlightened in its study of the questions referred to it were to invest the Opinions of the Court with the necessary authority.

The case now before the Court falls within neither of the two categories of questions in respect of which the advisory function of the Court has been provided: it is neither an abstract question nor a "question actually pending between two or more States". The Court, whose duty it is to ascertain the reality of the relations which are at the basis of the question to be answered by it, has not failed to note that it is confronted by the final stage in the proceedings between Unesco and its former officials. Having been regularly seised by an Organization duly authorized to do so by the General Assembly, and having been seised of a legal question arising within the field of the Organization's activities, the Court is competent to give an answer to that question; however, as is noted in the Opinion, the procedure thus brought into being "appears as serving, in a way, the object of a judicial appeal" against the four judgments of the Administrative Tribunal, and this utilization of the advisory procedure was certainly not contemplated by the draftsmen of the Charter and of the Statute of the Court.

Of course what is involved is not a regular appeal. Such appeals were contemplated by the delegation of Venezuela at the San Francisco Conference and would have necessitated an appropriate modification of Article 34 of the Statute which was formulated by that delegation in the following terms: "As a Court of Appeal, the Court will have jurisdiction to take cognizance over such cases as are tried under original jurisdiction by international administrative tribunals dependent upon the United Nations when the appeal would be provided in the Statute of such tribunals." This proposal was defeated. (Doc. 284, IV/1/24.)

It is conceivable that a question relating to the validity of a judgment of the Administrative Tribunal should be referred to the Court in an isolated manner, within the framework of its normal advisory activity and in accordance with the rules and principles governing that activity; but even in that case the problem would present grave difficulties. In the case now before the Court the character of a final settlement by means of appeal against the four judgments follows from the fact that the Request for an Advisory Opinion has been made in accordance with Article XII of the Statute of the Administrative Tribunal; the binding character of the Opinion does not in itself affect the competence of the Court but constitutes further proof that what is involved is an appeal in the form of a Request for an Advisory Opinion.

As regards the procedure, Unesco, in approaching the Court, was guided by the special provisions laid down by the Council of the League of Nations in the case of the former officials of the Saar, which had moreover never been applied; it was also guided by the Resolution which was recently adopted by the General Assembly with a view to amending the Statute of the Administrative Tribunal of the United Nations. The Director-General, who was "anxious to ensure the fullest possible equality of rights to those concerned", stated that he was prepared to transmit their views to the Court (statement by the Legal Adviser, read at the meeting of the Executive Board held on November 25th, 1955, Doc. 42 Ex/SR/1-27). This procedure, to which the Court did not object, has led to a situation in which one of the parties to the proceedings before the Administrative Tribunal can only send its observations to the Court through the intermediary of the other party.

As regards the oral proceedings, Unesco has expressed its intention of refraining from presenting an oral statement for the same reasons. The afore-mentioned statement by the Legal Adviser, however, added the following words: "It should, furthermore, be noted that in order to fulfil its purpose—which is to ensure the fullest possible equality of rights—abstention from the presentation of oral statements must be total and must apply not only to the organization concerned, but also to the other international organi-

zations and to Member States." In this way, since the officials concerned were unable to appear before the Court, the States, Organizations and even the Court had to dispense with the oral argument which is the rule in advisory proceedings.

The fact that this unusual procedure has not given rise to any objection on the part of those concerned and that it has been consented to by counsel for the officials is irrelevant. These officials had no place in the normal advisory procedure. The important thing is that the oral proceedings, which constitute the means by which the Court usually obtains clarification of the issue before it, have been dispensed with beforehand.

Unesco alone may apply to the Court to challenge the judgments of the Administrative Tribunal. It was legally impossible to confer the same right on the officials. They won their case before the Tribunal; had they lost it, no remedy would have been available to them. This inequality in itself may not constitute a bar to the Court's giving an Opinion in this case; it does however add to the situation in which the Court finds itself, a situation which is not compatible with its judicial character. Furthermore, any attempt to reduce, if not eliminate, these inequalities between the Organization and the individuals further emphasizes the contradictions between this hybrid procedure and the Statute of the Court, for in the final analysis this procedure runs counter to the fundamental provisions of Article 34 to the effect that "Only States may be parties in cases before the Court" and to the provisions of Articles 65 and 66 by virtue of which only States and international organizations may participate in advisory proceedings.

For these reasons, it is my view that the Court would follow a safer course by refraining from complying with the Request for an Opinion. Since the Court has decided otherwise, I concur in the answers given by the Court although I do not agree with all the reasoning of the Opinion.

(Signed) Bohdan WINIARSKI.