

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

INTERPRÉTATION DES TRAITÉS DE
PAIX CONCLUS AVEC LA BULGARIE,
LA HONGRIE ET LA ROUMANIE

(DEUXIÈME PHASE)

AVIS CONSULTATIF DU 18 JUILLET 1950

1950

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

INTERPRETATION OF PEACE
TREATIES WITH BULGARIA,
HUNGARY AND ROMANIA

(SECOND PHASE)

ADVISORY OPINION OF JULY 18th, 1950

Le présent avis doit être cité comme suit :
« *Interprétation des traités de paix (deuxième phase),*
Avis consultatif: C. I. J. Recueil 1950, p. 221. »

This Opinion should be cited as follows:
“*Interpretation of Peace Treaties (second phase),*
Advisory Opinion: I.C.J. Reports 1950, p. 221.”

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INTERPRETATION OF PEACE
TREATIES WITH BULGARIA,
HUNGARY AND ROMANIA
(SECOND PHASE)

Interpretation of article of a treaty referring the settlement of disputes to a commission composed of one representative from each party and a third member chosen by common agreement between the two parties; power conferred upon the Secretary-General of the United Nations to proceed to the appointment of a third member, failing agreement between the parties.—Inapplicability of this provision to the case in which one of the parties refuses to appoint its own commissioner.—Natural and ordinary meaning of the terms; meaning which accords with the normal order of the appointment of commissioner—provision to be strictly construed.—Breach of a treaty obligation; impossibility of providing a remedy by modifying the conditions for the exercise of the power to appoint the third member as laid down in the Treaties.—Impossibility to apply the principle of interpretation ut res magis valeat quam pereat contrary to the letter and spirit of the Treaties.

ADVISORY OPINION

Present: President BASDEVANT; *Vice-President* GUERRERO;
Judges ALVAREZ, HACKWORTH, WINIARSKI, DE
VISSCHER, SIR ARNOLD MCNAIR, KLAESTAD, BADAWI
PASHA, KRYLOV, READ, HSU MO, AZEVEDO; *Registrar*
HAMBRO.

THE COURT,

composed as above,

gives the following Advisory Opinion :

On October 22nd, 1949, the General Assembly of the United Nations adopted the following Resolution :

“Whereas the United Nations, pursuant to Article 55 of the Charter, shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Whereas the General Assembly, at the second part of its Third Regular Session, considered the question of the observance in Bulgaria and Hungary of human rights and fundamental freedoms,

Whereas the General Assembly, on 30 April 1949, adopted Resolution 272 (III) concerning this question in which it expressed its deep concern at the grave accusations made against the Governments of Bulgaria and Hungary regarding the suppression of human rights and fundamental freedoms in those countries; noted with satisfaction that steps had been taken by several States signatories to the Treaties of Peace with Bulgaria and Hungary regarding these accusations; expressed the hope that measures would be diligently applied, in accordance with the Treaties, in order to ensure respect for human rights and fundamental freedoms; and most urgently drew the attention of the Governments of Bulgaria and Hungary to their obligations under the Peace Treaties, including the obligation to co-operate in the settlement of the question,

Whereas the General Assembly has resolved to consider also at the Fourth Regular Session the question of the observance in Romania of human rights and fundamental freedoms,

Whereas certain of the Allied and Associated Powers signatories to the Treaties of Peace with Bulgaria, Hungary and Romania have charged the Governments of those countries with violations of the Treaties of Peace and have called upon those Governments to take remedial measures,

Whereas the Governments of Bulgaria, Hungary and Romania have rejected the charges of Treaty violations,

Whereas the Governments of the Allied and Associated Powers concerned have sought unsuccessfully to refer the question of Treaty violations to the Heads of Mission in Sofia, Budapest and Bucharest, in pursuance of certain provisions in the Treaties of Peace,

Whereas the Governments of these Allied and Associated Powers have called upon the Governments of Bulgaria, Hungary and

Romania to join in appointing Commissions pursuant to the provisions of the respective Treaties of Peace for the settlement of disputes concerning the interpretation or execution of these Treaties,

Whereas the Governments of Bulgaria, Hungary and Romania have refused to appoint their representatives to the Treaty Commissions, maintaining that they were under no legal obligation to do so,

Whereas the Secretary-General of the United Nations is authorized by the Treaties of Peace, upon request by either party to a dispute, to appoint the third member of a Treaty Commission if the parties fail to agree upon the appointment of the third member,

Whereas it is important for the Secretary-General to be advised authoritatively concerning the scope of his authority under the Treaties of Peace,

The General Assembly

1. *Expresses* its continuing interest in and its increased concern at the grave accusations made against Bulgaria, Hungary and Romania ;

2. *Records* its opinion that the refusal of the Governments of Bulgaria, Hungary and Romania to co-operate in its efforts to examine the grave charges with regard to the observance of human rights and fundamental freedoms justifies this concern of the General Assembly about the state of affairs prevailing in Bulgaria, Hungary and Romania in this respect ;

3. *Decides* to submit the following questions to the International Court of Justice for an advisory opinion :

- 'I. Do the diplomatic exchanges between Bulgaria, Hungary and Romania, on the one hand, and certain Allied and Associated Powers signatories to the Treaties of Peace, on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania ?'

In the event of an affirmative reply to question I :

- 'II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in question I, including the provisions for the appointment of their representatives to the Treaty Commissions ?'

In the event of an affirmative reply to question II and if, within thirty days from the date when the Court delivers its opinion,

the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice :

'III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?'

In the event of an affirmative reply to question III :

'IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?'

4. *Requests* the Secretary-General to make available to the International Court of Justice the relevant exchanges of diplomatic correspondence communicated to the Secretary-General for circulation to the Members of the United Nations and the records of the General Assembly proceedings on this question ;

5. *Decides* to retain on the agenda of the Fifth Regular Session of the General Assembly the question of the observance of human rights and fundamental freedoms in Bulgaria, Hungary and Romania, with a view to ensuring that the charges are appropriately examined and dealt with."

In an Opinion given on March 30th, 1950 (I.C.J. Reports of Judgments, Advisory Opinions and Orders, 1950, pp. 65 *et seq.*), the Court answered :

To question I :

"that the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania ;"

To question II :

"that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles referred

to in Question I, which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions."

On March 30th, the Registrar notified the substance of the Court's answers to the foregoing two questions by telegrams to the Secretary-General of the United Nations and to the Governments of all the signatories of the Peace Treaties.

By telegram of May 1st, 1950, confirmed by letter of the same date and filed in the Registry on May 2nd, the Acting Secretary-General of the United Nations notified the Court that he had not received information, within thirty days of the date of the delivery of the Court's Advisory Opinion quoted above, that any one of the three Governments had appointed its representative to the Treaty Commissions.

By Order made on May 5th, 1950, the President of the Court, as the Court was not then sitting, decided: (1) to fix Monday, June 5th, 1950, as the date of expiry of the time-limit for the submission by the States concerned, of written statements on Questions III and IV of the foregoing Resolution; (2) to reserve the rest of the procedure for further decision.

A certified copy of this Order, the operative part of which had been notified by telegram of May 5th to the Secretary-General and the Governments concerned, was sent to all these Governments by letter of May 9th.

By letter of May 16th, 1950, the Secretary-General of the United Nations sent to the Registrar additional documents including new diplomatic correspondence on the present case, transmitted to the United Nations by the delegations of Canada, of the United Kingdom of Great Britain and Northern Ireland and of the United States of America. These documents are listed in an annex hereto.

By letter of June 2nd, 1950, a written statement from the Government of the United States of America relating to Questions III and IV was transmitted to the Registry of the Court.

The United Kingdom Government had previously stated its views on Questions III and IV in the written statement submitted during the first phase of this case.

By letter of May 5th, 1950, the Assistant Secretary-General of the United Nations in charge of the Legal Department informed the Registry of his intention to take part in the oral proceedings.

By letters of June 12th and 22nd, 1950, respectively, the Government of the United States and the United Kingdom Government stated their intention of submitting oral statements.

At public sittings held on June 27th and 28th, 1950, the Court heard oral statements submitted :

on behalf of the Secretary-General of the United Nations by Dr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department ;

on behalf of the Government of the United States of America, by the Hon. Benjamin V. Cohen ;

on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland, by Mr. G. G. Fitzmaurice, C.M.G., Second Legal Adviser of the Foreign Office.

* * *

Having stated, in its Opinion of March 30th, 1950, that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles of the Peace Treaties which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions, and having received information from the Secretary-General of the United Nations that none of those Governments had notified him, within thirty days from the date of the delivery of the Court's Advisory Opinion, of the appointment of its representative to the Treaty Commissions, the Court is now called upon to answer Question III in the Resolution of the General Assembly of October 22nd, 1949, which reads as follows :

“III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties ?”

Articles 36, 40 and 38, respectively, of the Peace Treaties with Bulgaria, Hungary and Romania, after providing that disputes concerning the interpretation or execution of the Treaties which had not been settled by direct negotiation should be referred to the Three Heads of Mission, continue :

“Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

The question at issue is whether the provision empowering the Secretary-General to appoint the third member of the Commission applies to the present case, in which one of the parties refuses to appoint its own representative to the Commission.

It has been contended that the term "third member" is used here simply to distinguish the neutral member from the two Commissioners appointed by the parties without implying that the third member can be appointed only when the two national Commissioners have already been appointed, and that therefore the mere fact of the failure of the parties, within the stipulated period, to select the third member by mutual agreement satisfies the condition required for the appointment of the latter by the Secretary-General.

The Court considers that the text of the Treaties does not admit of this interpretation. While the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners it is nevertheless true that according to the natural and ordinary meaning of the terms it was intended that the appointment of both the national Commissioners should precede that of the third member. This clearly results from the sequence of the events contemplated by the article: appointment of a national Commissioner by each party; selection of a third member by mutual agreement of the parties; failing such agreement within a month, his appointment by the Secretary-General. Moreover, this is the normal order followed in the practice of arbitration, and in the absence of any express provision to the contrary there is no reason to suppose that the parties wished to depart from it.

The Secretary-General's power to appoint a third member is derived solely from the agreement of the parties as expressed in the disputes clause of the Treaties; by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein. The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own Commissioner. The power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists.

Reference has been made for the purpose of justifying the reversal of the normal order of appointment, to the possible advantage that might result, in certain circumstances, from the appointment of a third member before the appointment by the parties of their respective commissioners. Such a change in the normal sequence could only

be justified if it were shown by the attitude of the parties that they desired such a reversal in order to facilitate the constitution of the Commissions in accordance with the terms of the Treaties. But such is not the present case. The Governments of Bulgaria, Hungary and Romania have from the beginning denied the very existence of a dispute, and have absolutely refused to take part, in any manner whatever, in the procedure provided for in the disputes clauses of the Treaties. Even after the Court had given its Advisory Opinion of March 30th, 1950, which declared that these three Governments were bound to carry out the provisions of the Peace Treaties for the settlement of disputes, particularly the obligation to appoint their own Commissioners, these Governments have continued to adopt a purely negative attitude.

In these circumstances, the appointment of a third member by the Secretary-General, instead of bringing about the constitution of a three member Commission such as the Treaties provide for, would result only in the constitution of a two-member Commission. A Commission consisting of two members is not the kind of commission for which the Treaties have provided. The opposition of the Commissioner of the only party represented could prevent a Commission so constituted from reaching any decision whatever. Such a Commission could only decide by unanimity, whereas the dispute clause provides that "the decision of the majority of the members of the Commission shall be the decision of the Commission and shall be accepted by the parties as definitive and binding". Nor would the decisions of a Commission of two members, one of whom is appointed by one party only, have the same degree of moral authority as those of a three-member Commission. In every respect, the result would be contrary to the letter as well as the spirit of the Treaties.

In short, the Secretary-General would be authorized to proceed to the appointment of a third member only if it were possible to constitute a Commission in conformity with the provisions of the Treaties. In the present case, the refusal by the Governments of Bulgaria, Hungary and Romania to appoint their own Commissioners has made the constitution of such a Commission impossible and has deprived the appointment of the third member by the Secretary-General of every purpose.

As the Court has declared in its Opinion of March 30th, 1950, the Governments of Bulgaria, Hungary and Romania are under an obligation to appoint their representatives to the Treaty Commissions, and it is clear that refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment. These conditions are not present in this case, and their absence

is not made good by the fact that it is due to the breach of a treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing ; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.

The principle of interpretation expressed in the maxim : *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.

It has been pointed out that an arbitration commission may make a valid decision although the original number of its members, as fixed by the arbitration agreement, is later reduced by such circumstances as the withdrawal of one of the commissioners. These cases presuppose the initial validity of a commission, constituted in conformity with the will of the parties as expressed in the arbitration agreement, whereas the appointment of the third member by the Secretary-General in circumstances other than those contemplated in the Treaties raises precisely the question of the initial validity of the constitution of the Commission. In law, the two situations are clearly distinct and it is impossible to argue from one to the other.

Finally, it has been alleged that a negative answer by the Court to Question III would seriously jeopardize the future of the large number of arbitration clauses which have been drafted on the same model as that which appears in the Peace Treaties with Bulgaria, Hungary and Romania. The ineffectiveness in the present case of the clauses dealing with the settlement of disputes does not permit such a generalization. An examination of the practice of arbitration shows that, whereas the draftsmen of arbitration conventions have very often taken care to provide for the consequences of the inability of the parties to agree on the appointment of a third member, they have, apart from exceptional cases, refrained from anticipating a refusal by a party to appoint its own commissioner. The few Treaties containing express provisions for such a refusal indicate that the States which adopted this course felt the impossibility of remedying this situation simply by way of interpretation. In fact, the risk of such a possibility of a refusal is a small one, because normally each party has a direct interest in the appointment of its commissioner and must in any case be presumed to observe its treaty obligations. That this was not so in the present case does not justify the Court in exceeding its judicial function on the pretext

of remedying a default for the occurrence of which the Treaties have made no provision.

Consequently, Question III must be answered in the negative. It is therefore not necessary for the Court to consider Question IV, which requires an answer only in the event of an affirmative answer to the preceding Question.

For these reasons,

THE COURT IS OF OPINION,

by eleven votes to two,

that, if one party fails to appoint a representative to a Treaty Commission under the Peace Treaties with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, the Secretary-General of the United Nations is not authorized to appoint the third member of the Commission upon the request of the other party to a dispute.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this eighteenth day of July, one thousand nine hundred and fifty, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) BASDEVANT,
President.

(Signed) E. HAMBRO,
Registrar.

* * *

Judge KRYLOV, while joining in the conclusions of the opinion and the general line of argument, declares that he is unable to concur in the reasons dealing with the problem of international responsibility which, in his opinion, goes beyond the scope of the request for opinion.

Judges READ and AZEVEDO, declaring that they are unable to concur in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their dissenting opinion.

(Initialled) J. B.

(Initialled) E. H.

ANNEX

DOCUMENTS TRANSMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE SECRETARY-GENERAL OF THE UNITED NATIONS IN ACCORDANCE WITH THE RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY ON 22 OCTOBER, 1949

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[See paragraphs
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[*Note—See Folder 4 for :*

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[*Note—See Folder 11 for :*

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