DISSENTING OPINION BY JUDGE KRYLOV

[*Translation*]

I. *Analysis of the Request for Opinion of October 22nd, 1949.*

I appreciate the fact that in its Advisory Opinion the Court has shown its intention of making it clear that it was not called upon to say whether Bulgaria, Hungary and Romania had performed the Treaty clauses on human rights and fundamental freedoms.

But I have to consider that the second Question of the Request for Opinion asks the Court to reply on the following point : are the Governments of Bulgaria, Hungary and Romania "obligated to carry out the provisions of the articles referred to in Question I ?"

Question I not only refers to Article 36 of the Peace Treaty with Bulgaria and the corresponding articles of the two other Treaties, but also to Article 2 of the Treaties with Bulgaria and Hungary, and Article 3 of the Peace Treaty with Romania.

The wording of both questions shows, therefore, that the Assembly has asked the Court to consider the dispute which has arisen not only in connexion with the so-called "performance" clauses, but also in connexion with Articles 2 and 3 of the said Treaties for the safeguard of human rights and fundamental freedoms.

This view is supported further by the "recitals" of the Resolution of the General Assembly of October 22nd, 1949 ; the very first recital quotes Article 55 of the Charter in favour of universal respect and observance of human rights and fundamental freedoms. The following recitals of the Resolution make it evident that the General Assembly had "increased concern" at the "accusations" based on alleged violations of human rights and fundamental freedoms in the three States mentioned above.

In the course of argument before the Court, stress was laid on the will of the United Kingdom and the United States Governments to examine the rules concerning human rights in the three States of the People's Democracy (*vide* principally item 3 of the "formal submissions" of the United Kingdom representative).

The Court itself considers in this Opinion that it has before it "the disputes relating to the question of the performance or non-performance of the obligations provided in the articles dealing with human rights and fundamental freedoms".

This being so, I cannot share the opinion of the Court that the legal position of Bulgaria, Hungary and Romania "cannot be in any way compromised" by the answers that the Court has decided to give and that the Opinion "in no way prejudges" the decisions that may be taken on the present disputes.

II. *Legal nature of advisory opinions and the two types of opinion.*

If one remains on the surface and limits oneself to dogmatic analysis of the Statute and the Rules of Court, one is inclined to find a considerable difference between the competence of the Court in contentious cases and in the exercise of its advisory function.

I do not deny the difference in the least. But, as will appear further on, it should not be overestimated. One must take into account the tendency of the two functions of the Court to get closer —the jurisdictional and the advisory. This progressive assimilation may be seen, and has been noted, by several eminent authors (e.g. Mr. Charles De Visscher, *Recueil des Cours de l'Académie de Droit international*, 1929, Vol. 26), in a study of the activity of the Permanent Court of International Justice.

I shall deal later on with Advisory Opinion No. 5 of the Permanent Court of International Justice on the status of Eastern Carelia. But I shall now quote one of the assertions made by the Court in that Opinion :

> "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."

This statement of principle was later reproduced and incorporated in the Statute of the Court and in the Rules of 1936, as well as in the Statute and the Rules of the present Court.

Article 68 of the present Statute says that: "In the exercise of its advisory functions, the Court shall .... be guided by the provisions of the present Statute which apply in contentious cases." The same article adds : "to the extent to which it recognizes them to be applicable". The latter sentence is perfectly understandable, but in no way changes the meaning of the principle set forth in the article.

Article 82 of the Rules paraphrases the above provision of Article 68 of the Statute and adds the following provision :

> ".... for this purpose 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".

I observe that there are two kinds of advisory opinions :

(1) advisory opinions which do not deal with a legal question actually pending between two or more States ;

(2) advisory opinions dealing with such a question.

These last opinions are referred to in Article 83 of the Rules of Court.

Under that article, if the advisory opinion is requested in connexion with a legal question "actually pending between two or more States", the Court shall apply Article 31 of the Statute

on *ad hoc* judges and the appropriate provisions of the Rules.

The States referred to in Article 83 of the Rules may be defined as States divided by the existence of a legal question "actually pending between them", namely as States concerned in the decision which the Court shall take in the matter. They are not, so to speak, party-States, as they exist in contentious cases.

They may simply be called the States concerned. This is why Article 83 gives them the right to designate the judge. This last provision presupposes that the State concerned consents to take part in the preparation of the opinion, as a consequence of the designation by it of an *ad hoc* judge.

As to the opinions which do not deal with a legal question actually pending between States, the Court is free to give them without the consent of any State whatever. As a rule, such questions are of a general nature and cannot affect the rights of a State. If any State should appear before the Court in such a case, this action is taken for the purpose of assisting the Court, of giving to the Court the necessary information, etc. In that case, the State appears not as a "party" but as an "*informateur*" of the Court.

The existence of these two kinds of opinions must be noted and evens tressed. In one case, the State is a mere *informateur*, in the other the position of the State is more akin to that of a party-State in a contentious case.

By disregarding this distinction, by overlooking the true nature of the position of a State, the consent of which is necessary to permit the Court to examine the case and give an opinion, one may frustrate the administration of international justice, "introduce, without explicitly saying so, more or less surreptitiously", a reply to the request which would be tantamount to a decision in a case of compulsory jurisdiction (cf. Opinion of seven judges in the *Reports of Judgments, Advisory Opinions and Orders of the Court 1947-1948*, p. 32). In other words, the request for an opinion would correspond to the application in a contentious case.

Such action by the Court may be compared to an abuse of power. This has been judiciously stated by Judge Azevedo in his Individual Opinion of May 28th, 1948, in which he qualifies such action as diversion, travesty, etc. (*ibid.*, p. 73).

III. *Nature of the Request for Opinion of October 22nd, 1949.*

There is no doubt as to the nature of the present Request for Opinion.

Two States—the United States and the United Kingdom—have appeared before the Court to support "grave accusations" which they have made against Bulgaria, Hungary and Romania

and which have been discussed during two sessions of the General Assembly.

The three "accused" States—Bulgaria, Hungary and Romania—did not take part in the discussion in the General Assembly and refused to take the slightest part in the discussion of the Request by the Court.

Therefore, there is "a legal question actually pending" between those five States. It is worthy of note that the representative of the United Kingdom wound up his oral statement in Court by "formal submissions", as he would have done in a contentious case.

In my opinion, the present request must be dealt with—in so far as possible—as a contentious case would be.

I think that the Court could not exercise its consultative function in this case unless the interested States, including Bulgaria, Hungary and Romania, had expressly consented.

This is demonstrated by the general meaning of the texts quoted and especially by the precedent established by the P.C.I.J. on July 23rd, 1923.

IV. *The principle laid down in the Eastern Carelia case and the inadequacy of objections raised against that principle.*

I wish now to analyze the reasons of the Permanent Court for refusing to give an opinion (Advisory Opinion No. 5).

The Council of the League of Nations requested the Permanent Court to give an advisory opinion on the following question: "Were there engagements of an international character placing Russia under an obligation to Finland as to the carrying out of the provisions of the Peace Treaty signed at Yourief on October 14th, 1920?"

In its Opinion, the Permanent Court came to the conclusion that there existed "an actual dispute between Finland and Russia".

In the course of its argument, the Permanent Court laid stress on the fact that the independence of States is at the basis of international law.

> "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." (Publications of the P.C.I.J., Series B, Advisory Opinion No. 5, p. 27.)

Taking note of the fact that Russia had never consented, the Court declared that "it finds it impossible to give its Opinion on a dispute of this kind" (p. 28).

> "The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance,

however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia...." (Pp. 28-29.)

And the Court concludes:

"Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court." (P. 29.)

In my opinion, the reasons given by the Permanent Court must be adopted in the present case. The result must be a refusal to give the requested opinion. The principle of the independence of States is one of the fundamental principles in international relations. It is confirmed in Article 2, paragraph 1, of the United Nations Charter setting forth the principle of the sovereign equality of States.

The arguments put forward against this assertion do not convince me. I shall now review them.

(1) It has been attempted first to say that the refusal of the Permanent Court to answer the question in the Eastern Carelia case was due to practical difficulties, lack of documentation, etc. That is not the case. The text of the Opinion itself shows that the Permanent Court's refusal is a matter of principle and not of mere opportunity. In that Opinion, the Permanent Court marked a departure in the development of advisory opinions see above Title II). The Court has shown that the consent of the State concerned is necessary for the Court to give its Opinion in cases where it has to decide on a legal question "actually pending" between States. The Court has stated a principle of capital significance and one cannot turn a decision of principle into a decision of circumstance.

(2) It has been said that the Court was bound to give an answer to the request in its capacity of principal judicial organ of the United Nations, because the request came from the General Assembly. It was even hinted that the present Court had a lesser degree of autonomy than the Permanent Court.

I take exception to this last idea. At a meeting of the Juridical Committee, at Dumbarton Oaks, presided over by Mr. Hackworth, the latter put to the Russian delegation the following question: Will participation in the Charter result in participation in the Statute of the Court? The answer was given in the affirmative and mutual agreement on the question materialized in the provisions of Article 93 of the Charter: "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." This does not imply, in any way, that

this Court is less independent than the Permanent Court of International Justice and that it is bound to answer the General Assembly's request.

This idea is refuted, as it is noted by this Opinion of the Court, by the very wording of Article 65 of the Statute.

The theory that the Court is obliged to answer the Request for an Opinion is not a novelty. It was put forward thirty years ago by the critics of the Opinion of the Permanent Court on the question of Eastern Carelia. Such was the case, for example, of Mr. Strupp (*La question carélienne et le droit des gens*, 1924). This theory is contrary to the very substance of the judicial organ, the independence of which must be guaranteed.

Moreover, there are, and there may be, States parties to the Statute of the Court which are not members of the United Nations. This accentuates the independence of the Court, its special position as an organ of the United Nations.

Of course, the Court has the duty to discuss, analyze, etc., the Request. But it is not obliged to answer (cf. the remarks of Mr. Hackworth : *Hearings before the Committee on Foreign Relations of the Senate of the United States*, p. 336).

(3) It has been said that the Eastern Carelia case raised before the Permanent Court a question of substance, whereas in the present case only a procedural question was before the Court, or rather a preparatory, a preliminary question.

I cannot share this view.

In both cases, the Eastern Carelia case and the present one, the Court is asked to interpret an international treaty.

In the present case, the Court must examine the clauses of the Treaties signed with Bulgaria, Hungary and Romania on human rights and fundamental freedoms, and the so-called performance clauses (see above, Title I).

The Court's answer will have great influence on the future development of the case. This answer may be utilized for political purposes—to compromise the States of the People's Democracy.

(4) It has been said that the fact that Bulgaria, Hungary and Romania are not members of the United Nations was irrelevant. This is not my opinion. In the case of Eastern Carelia, Russia, in 1923, was not a member of the League of Nations. In the present case, the three States—Bulgaria, Hungary and Romania —are not members of the United Nations. They have not been admitted to the Organization. Therefore, the arguments put forward by the Permanent Court, based on the fact that Russia was not a member of the League of Nations, preserved their full value in the present case.

(5) It was stressed before the Court that the Charter does not explicitly require the consent of the State concerned in the case of a request for opinion addressed to the Court by an organ of the United Nations. This is quite true, but this is due to the fact that, in Article 96, the Charter contemplates the case of a request for opinion on a legal question which does not affect any one State. Article 96 does not contemplate the case of a question "actually pending" between several States, whereas this is the case in the present instance.

For the reasons already stated, I believe that the consent of the States concerned is necessary in the present case and the Court must follow the precedent of Eastern Carelia.

V. *Additional comments in justification of the refusal to answer the Request for Opinion of October 22nd, 1949.*

It was demonstrated in Title I that the purpose of the Request for Opinion of October 22nd, 1949, is to define the decisions to be taken by Bulgaria, Hungary and Romania, not only regarding the designation of their representatives on the Arbitration Commissions, but also in matters concerning human rights and fundamental freedoms.

The obligations which the three States must perform in the field of human rights and fundamental freedoms derived from the provisions mentioned above of the Peace Treaties, and not from the Charter of the United Nations. Bulgaria, Hungary and Romania are neither members of the United Nations, nor parties to the Statute of the Court. They cannot be bound by articles of the Charter and of the Statute.

The signatory States have an exclusive right, therefore, to interpret the respective clauses of the Treaties. The Court may not have the right to interpret them, unless the parties concerned give their consent, which is not the case.

Taking into consideration this absence of consent, it is necessary to consider the problem of the essentially domestic jurisdiction of these States, mainly because the question of human rights and fundamental freedoms is so closely knit with that of sovereignty.

One must not forget that the refusal of the Permanent Court to give an opinion in the Eastern Carelia case was probably inspired by the fact that the question submitted to the Court concerned the internal affairs of Soviet Russia.

The question of human rights and fundamental freedoms, which, it is alleged, Bulgaria, Hungary and Romania have failed to observe, is after all no more than the problem of the functioning of the judicial and administrative authorities of these States. There is no doubt that the question so defined belongs to the essentially domestic jurisdiction of the State and, as such, is out of the jurisdiction of this Court.

It has often been said that if the question is regulated by an international treaty, it ceases to be a matter of domestic jurisdiction. The Advisory Opinion of the Permanent Court in the case of the Nationality Decrees in Tunis and Morocco has been the chief means of implanting this opinion and transforming it into a sort of legal assumption.

It is not my intention to examine this question in every detail. I merely want to stress : (*a*) that this doctrine arose from reference to Article 15, paragraph 8, of the Covenant of the League of Nations, which dealt with matters within the exclusive domestic jurisdiction of the State ; (*b*) that in the specific case (Nationality in Morocco and Tunis) the Court considered the consent of two countries : France and Great Britain.

The doctrine of national competence of the State has nowadays received its new expression. This is the wording of Article 2, paragraph 7, of the Charter of the United Nations. It will be recalled that this article refers to matters which are essentially—and not exclusively—within the domestic jurisdiction of a State. The wording of this text contemplates that the case might come within the domestic jurisdiction of the State, despite the fact that it has been dealt with in a treaty. Even in that case, the matter may still remain essentially within the domestic jurisdiction.

As an example, I shall quote the adhesion of some States to the optional clause of Article 36, paragraph 2, of the Statute of the Court. Even in subscribing to this clause, the States retain the right to give the final definition of what comes within their domestic jurisdiction.

The Belgian author, Mr. Joseph Nisot, has judiciously observed in his recent article in the *American Journal of International Law* (Art. 2, para. 7, of the United Nations Charter, as compared with Art. 15, para. 8, of the Covenant of the League of Nations) that the scope of the domestic jurisdiction of the State has extended considerably under the Charter. Having in mind the circumstances in which the new world organization was born, and the difficulties to be overcome to obtain ratification of the Charter by several States, it is easy to explain the causes of this extension of the domestic jurisdiction of the State.

At San Francisco, stress was laid, in particular, on the fact that a broader concept of the domestic jurisdiction of the State was primarily necessary for the protection of smaller and medium nations. One also had the impression that it was necessary to broaden the domestic jurisdiction of the State to set aside the difficulties which might arise from the competence of the Economic and Social Council. One had principally in mind the clause of Article 55 of the Charter on human rights and fundamental freedoms. The drafting of this article, aiming at *promoting* respect for these rights and liberties, was intended to avoid the possibility of interference by

the Organization in the national domain of the State. This wording was prepared mainly at the suggestion of the delegation of the United States of America. The appropriate note can be found in the Records of a special committee—Committee II/3—of the San Francisco Conference (Documents, t. X, pp. 271-272).

This character of the Charter clause on human rights and fundamental freedoms is made even clearer by the fact that the General Assembly has, until now, approved only the Declaration on this question. The Covenant, securing these rights and freedoms, has not yet been set up and will be framed and adopted by the General Assembly only if matters essentially within the domestic jurisdiction of the State are removed from its contents.

In those conditions, it would be much more desirable to have the consent of the States concerned so that the Court may give an opinion on the questions raised by the Request of October 22nd, 1949.

VI. *Conclusion.*

The reasons here above lead me to the conclusion that, in the present circumstances, it is inadvisable to give the answers requested in the Resolution of October 22nd, 1949.

As I have stated already, the Court does not have the consent of any one of the three States of the People's Democracy. This consent is all the more necessary, since there is considerable tension in the relations between the Governments that have appeared before the Court on the one hand, and the "accused" Governments on the other. This tension has already been manifested in one case by the breaking of diplomatic relations.

In those conditions, the Court cannot fail to see that its affirmative answers to the questions raised by the General Assembly would drag the Court into the political struggle.

I have already had occasion to express the view that it is proper to refuse to give an advisory opinion on questions, the meaning and the purpose of which are primarily political, even though the General Assembly submits them to the Court (*Reports of Judgments*, etc., 1947-1948, p. 108).

I can only remain faithful to this view.

That is why it is not necessary for me to analyze the relevant articles of the Peace Treaties and the comments which the Court has made on them. In my previous arguments I have already expressed my disagreement with the views of the Court.

(*Signed*) S. KRYLOV.