DISSENTING OPINION BY JUDGE HACKWORTH.

I concur, but for different reasons, in the conclusion of the Court that the United Nations Organization has capacity to bring an international claim against the responsible government, with a view to obtaining reparation due in respect of damage caused by that government to the Organization. But I regret that I am unable to concur in that part of the Opinion having to do with the capacity of the Organization to sponsor an international claim in behalf of one of its agents.

The authority of the Organization to make a claim for damage caused to it by the wrongful act of a State can be very simply stated, as follows:

(1) Article 104 of the Charter gives the Organization "such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes".

(2) Paragraphs 1 and 2 of Article 105 specify that the Organization "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes", and that officials of the Organization shall "similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization".

(3) The Convention on Privileges and Immunities, adopted by the General Assembly on February 13th, 1946, recognizes that the United Nations shall possess juridical personality, with capacity (*a*) to contract; (*b*) to acquire and dispose of immovable and movable property; and (*c*) to institute legal proceedings; also that the Organization and its officials shall enjoy certain specified privileges and immunities.

The Convention has not been approved by all the Members of the Organization, but we may assume, for present purposes, that it is fairly representative of the views of most of them.

(4) It stands to reason that, if the Organization is to make contracts, to acquire and dispose of property, to institute legal proceedings, and to claim the benefits of the privileges and immunities to which it is entitled, it must be able to carry on negotiations with governments as well as with private parties. It must therefore be able to assert claims in its own behalf. No other conclusion consistent with the specified powers and with the inherent right of self-preservation could possibly be drawn. The Organization must have and does have ample authority to

take needful steps for its protection against wrongful acts for which Member States are responsible. Any damage *suffered by the Organization* by reason of wrongful acts committed against an agent, while in the performance of his duties, would likewise be within its competence.

This is a proper application of the doctrine of implied powers.

(5) I, therefore, find no difficulty in giving an affirmative answer to Question I (*a*) of the Assembly's request.

Such a claim by the United Nations would include any element of damage susceptible of proof under customary rules relating to damages in international claims. It would include any reasonable payments made by the Organization to the victim of the wrongful act or to those entitled through him, provided that such payments were made pursuant to contractual undertakings of the Organization, or on the basis of an established policy in such cases.

(6) Thus it would appear that under I (*a*) the Organization has ample and unquestionable authority to safeguard itself against derelictions by States, and to vindicate the dignity, honour and authority of the Organization. To this extent I am in agreement with the conclusions of the majority of the Court.

* * *

As to Question I (*b*), having to do with a claim for reparation due in respect of damage caused to the victim of a wrongful act or to persons entitled through him, as distinguished from a claim on behalf of the Organization itself, a different situation is presented.

The Court is asked to state its opinion as to whether the Organization has capacity to espouse such a claim. In giving our answer, we must look to the traditional international practice of nations with respect to private claims, and to the express treaty stipulations as regards the Organization.

As to international practice, we find at once that heretofore only States have been regarded as competent to advance such international claims.

As to the Organization, we find nothing to suggest that it too has capacity in this field. Certainly there is no specific provision in the Charter, nor is there provision in any other agreement of which I am aware, conferring upon the Organization authority to

assume the rôle of a State, and to represent its agents in the espousal of diplomatic claims on their behalf. I am equally convinced that there is no implied power to be drawn upon for this purpose.

It is stated in the majority opinion that the Charter does not expressly provide that the Organization should have capacity to include, in "its claim for reparation", damage caused to the victim or to persons entitled through him, but the conclusion is reached that such power is conferred by necessary implication. This appears to be based on the assumption that, to ensure the efficient and independent performance of missions entrusted to agents of the Organization, and to afford them moral support, the exercise of this power is necessary.

The conclusion that power in the Organization to sponsor private claims is conferred by "necessary implication" is not believed to be warranted under rules laid down by tribunals for filling lacunæ in specific grants of power.

There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted. No necessity for the exercise of the power here in question has been shown to exist. There is no impelling reason, if any at all, why the Organization should become the sponsor of claims on behalf of its employees, even though limited to those arising while the employee is in line of duty. These employees are still nationals of their respective countries, and the customary methods of handling such claims are still available in full vigour. The prestige and efficiency of the Organization will be safeguarded by an exercise of its undoubted right under point I (*a*) *supra*. Even here it is necessary to imply power, but, as stated above, the necessity is self-evident. The exercise of an additional extraordinary power in the field of private claims has not been shown to be necessary to the efficient performance of duty by either the Organization or its agents.

But we are presented with an analogy between the relationship of a State to its nationals and the relationship of the Organization

to its employees ; also an analogy between functions of a State in the protection of its nationals and functions of the Organization in the protection of its employees.

The results of this liberality of judicial construction transcend, by far, anything to be found in the Charter of the United Nations, as well as any known purpose entertained by the drafters of the Charter.

These supposed analogies, even assuming that they may have some semblance of reality, which I do not admit, cannot avail to give jurisdiction, where jurisdiction is otherwise lacking. Capacity of the Organization to act in the field here in question must rest upon a more solid foundation.

The Court advances the strange argument that if the employee had to rely on the protection of his own State, his independence might well be compromised, contrary to the intention of Article 100 of the Charter.

This would seem to be placing a rather low estimate upon the employee's sense of fidelity. But let us explore this a step further.

Article 100 provides that :

> "1. In the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
>
> 2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

This is a classical provision. It is found in this identical, or a slightly modified, form in each of the agreements establishing the various Specialized Agencies—some concluded before, and some subsequent to, the signing of the Charter.

For example, we find in Article 59 of the Convention on International Civil Aviation, signed in 1944, the following provision:

> "The President of the Council, the Secretary-General and other personnel shall not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the Organization. Each contracting State undertakes fully to respect the international character of the responsibilities of the personnel and not to seek to influence any of its nationals in the discharge of their responsibilities." (*Yearbook of the United Nations*, 1946-1947, pp. 728, 736.)

Article XII of the articles of agreement of the International Monetary Fund, negotiated in 1944, provides in Section 4 (*c*) :

> "The Managing Director and the staff of the Fund, in the discharge of their functions, shall owe their duty entirely to the Fund and to no other authority. Each member of the Fund shall respect the international character of this duty and shall refrain from all attempts to influence any of the staff in the discharge of his functions." (II, *United Nations Treaty Series*, 1947, pp. 40, 86.)

Article V of the contemporary agreement relating to the International Bank for Reconstruction and Development is practically identical with the provisions just quoted. (*Ibid.*, pp. 134, 166.)

Article 9, paragraphs 4 and 5, of the Constitution of the International Labour Organization, as amended, provides :

> "4. The responsibilities of the Director-General and the staff shall be exclusively international in character. In the performance of their duties, the Director-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
>
> 5. Each Member of the Organization undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities." (*Yearbook of the United Nations*, 1946-1947, pp. 670, 672.)

To the same effect see :

Article VIII of the Food and Agriculture Organization of the United Nations (*ibid.*, pp. 693, 695) ; Article VI of the Constitution of the United Nations Educational, Scientific and Cultural Organization (*ibid.*, pp. 712, 715) ; Article 37 of the Constitution of the World Health Organization (*ibid.*, pp. 793, 797) ; and Article 9 of the Constitution of the International Refugee Organization (*ibid.*, pp. 810, 813).

Is it to be supposed that each of the Organizations has the capacity to make diplomatic claims in behalf of its agents, and that this should be done in order that their fidelity to the Organization and their independence may not be compromised ? Reasons for such a conclusion would seem to have as great force here as in the case of the United Nations. The language employed in the respective instruments bears the same meaning.

Article 100 of the Charter, which, it should be remarked, relates only to the Secretary-General and the staff, cannot be drawn upon to claim for the Organization by indirection an authority which obviously cannot be claimed under any direct authorization.

The most charitable, and indeed the most realistic construction to be given the article is that it is designed to place service with the United Nations on a high plane of loyalty and fidelity and to require Member States to respect this status and not to seek to influence the Secretary-General or members of the staff in the discharge of their duties.

This bond between the Organization and its employees, which is an entirely proper and natural one, does not have and cannot have the effect of expatriating the employee or of substituting allegiance to the Organization for allegiance to his State. Neither the State nor the employee can be said to have contemplated such a situation. There is nothing inconsistent between continued allegiance to the national State and complete fidelity to the Organization. The State may still protect its national under international law. One can even visualize a situation where that protection might be directed against acts by the Organization itself.

The purpose of the article as stated in the Report of the Secretary of State to the President of the United States on the Results of the San Francisco Conference, June 26th, 1945, is :

> " .... to make it perfectly clear that the nationals of Member States serving on the staff of the Secretariat could not, in any sense of the word, be considered as agents of their governments". (*Department of State Publication* 2349, Conference Series 71, pp. 150, 151.)

It has also been suggested, as an argument in support of the proposition that the United Nations Organization should be regarded as having capacity in these cases, that the State of nationality would not be in a position to base an international claim in behalf of a national on the ground that privileges or immunities to which employees are entitled under the Charter or under provisions of the Convention relating to Privileges and Immunities had been violated.

If this be a sound view, it must be because the privileges and immunities are not for the personal benefit of the individual himself. That this is true is admitted by the Court and is made clear by Article V, Section 20, and Article VI, Section 23, of the Convention. The former specifies :

> "Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves." (I, *United Nations Treaty Series*, 1946-1947, pp. 16, 26.)

Since, according to this provision, the privileges and immunities inure to the benefit of the United Nations and not to the benefit of the individuals, any claim based upon a breach of them should be in favour of the Organization and would fall to be dealt with under I (*a*) above, and not under I (*b*).

Any claim on behalf of the individual must rest, not upon stipulations contained in the Convention, but upon general principles of international law.

What reason, then, is there for thinking that the United Nations, rather than the national State, should interpose on behalf of the individual ? It may well be that the weight of the Organization's authority would, in some cases, be more persuasive than that of the national State, but this is not a judicial reason, nor does it supply the legal capacity to act.

Aside from remedies afforded by local law under which private claimants may be allowed access to judicial or other tribunals for the adjustment of their claims against a government, the only remedy known to international law in such cases is through the government of the State of which the claimant is a national. "A citizen of one nation, wronged by the conduct of another nation, must seek redress through his own government. His government must assume the responsibility of presenting his claim, or it need not be considered." (United States *v.* Diekelman, 92 US. 520 ; VI, Moore's *Digest of International Law*, 607.)

Such claims must be presented through the diplomatic channel (*ibid.*).

Diplomatic protection is in its nature an international proceeding, constituting "an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties" (Borchard, *Diplomatic Protection of Citizens abroad*, 354 ; VI, Moore's *Digest*, 257).

A claim by one State against another on account of an injury to a national of the claimant State is based on the theory that the State has been injured through injury to its national. Equally sound is the theory that for the allegiance owed by the national to his State the latter owes the national its protection. Nationality is a *sine qua non* to the espousal of a diplomatic claim on behalf of a private claimant. Aside from the special situation of protected persons under certain treaties and that of seamen and aliens serving in the armed forces, all of whom are assimilated to the status of nationals, it is well settled that the right to protect is confined

to nationals of the protecting State. If the private claimant is not a national of the State whose assistance is sought, the government of that State cannot properly sponsor the claim, nor is the respondent government under any legal duty to entertain it.

International law on this subject is well settled, and any attempt to engraft upon it, save by international compact, a theory, based upon supposed analogy, that organizations, not States and hence having no nationals, may act as if they were States and had nationals, is, in my opinion, unwarranted. The Permanent Court of International Justice stated well the true situation when it said in the Panevezys-Saldutiskis Railway Case, February 28th, 1939:

> "In the opinion of the Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse." (P.C.I.J., Series A./B., No. 76, p. 16.)

See also to the same effect the Mavrommatis Palestine Concessions Case (P.C.I.J., Series A., No. 2, 1924, p. 12); and the case concerning the Payment of various Serbian Loans issued in France (P.C.I.J., Series A., Nos. 20/21, 1929, p. 17).

It is generally admitted that the State of the employee's nationality has a right to sponsor a claim, such as is here in question, and the General Assembly obviously envisaged the possibility of complications in this respect, as is shown by its second question, wherein it inquires how, in the event of an affirmative reply on point I (*b*), action by the United Nations is "to be reconciled with

such rights as may be possessed by the State of which the victim is a national".

The answer which I have suggested for point I (*a*) would probably give the Organization all that it needs from a practical point of view.

If it desires to go further and to espouse claims on behalf of employees, the conventional method is open. If the States should agree to allow the Organization to espouse claims on behalf of their nationals who are in the service of the Organization, no one could question its authority to do so. The respondent State would be relieved of the possibility of demands from two sources, the employee or his dependants would know to whom to look for assistance, and the whole procedure would be free from uncertainty and irregularity.

(*Signed*) GREEN H. HACKWORTH.