DISSENTING OPINION BY JUDGE BADAWI PASHA.

[*Translation.*]

After defining or making clear the meaning of the terms "agent" and "international claim", the Court goes on to show that the United Nations has international personality. Then, before dealing with the concrete cases envisaged in the Request for an Opinion, it reaches the conclusion that, on this ground, and apart from the object of the claim, the Organization has the capacity to bring international claims in so far as may be required in the performance of its duties.

Evidently, this conclusion cannot be disputed. Long before the Organization, international persons had existed ; and again quite recently a number of institutions have been set up, both before and after the Organization itself, which have this personality. The Charter of the International Trade Organization (the last of these institutions) expressly provides that it shall have international legal personality. It goes without saying that the United Nations, as the main Organization and the most important of all, must have international legal personality, just as much as one of its branches.

But, as the Court itself observes, a juridical system is not bound to admit that all persons to whom it accords rights are identical in their nature or as regards the extent of their rights.

In stating that the Organization has international personality, we shall therefore merely have defined its capacity as a subject of law in regard to an international claim ; but we shall not yet have shown that it has a particular right.

There is in fact no common law for international persons. There are, on the one hand, States that have common characteristics, rights and obligations, recognized in international law ; and, on the other hand, a number of persons of different nature and different rank : unions, commissions, international groups, with various names ; Specialized Agencies, such as I.L.O., W.H.O., F.A.O., I.R.O., I.T.O., the Monetary Fund, the International Bank, U.N.E.S.C.O. and lastly U.N. In spite of a certain resemblance one to another, each of these persons depends, as regards its objects, principles, organization, competence, rights and obligations, on the terms of its constitution, and is deemed to exist only for the benefit of States which have signed and ratified, or which have acceded to that instrument.

The Request for an Opinion relates to the Organization's right to claim reparation for damage caused (*a*) to itself, and (*b*) to the victim, when he is an agent of the United Nations, or to persons entitled through him.

International law recognizes that a State has the right to claim reparation for damage caused to itself and to the victim or to persons entitled through him, when he is a national of that State, and has not been able to obtain satisfaction through ordinary channels (right known as diplomatic protection of nationals abroad).

The first right belongs to the State as an attribute of its existence as a State, and as a consequence of its international personality ; the second is the fruit of a process of laborious crystallization that has been completed since the end of the nineteenth century. In spite of certain abuses that have accompanied its exercise, this right is universally recognized. But its conception and its justification have constantly been discussed. In fact, the right to claim reparation for injuries suffered by the victim or persons entitled through him arises in the person of the victim, or in that of the persons entitled, and as a general rule belongs only to other persons in so far as they represent the victim or the persons entitled through him.

International law recognizes that the State has the right to claim reparation in respect of this damage, not because it considers that the State is a legal representative of the victim, but because it holds that the State, in asserting its own right, the right which it has to ensure, in the person of its subjects, respect for the rules of international law (Judgment No. 2 of the P.C.I.J., Series A., No. 2, p. 12). 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 (Judgment of the P.C.I.J., February 28th, 1939, Series A./B., Fasc. 76, p. 16) [1].

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[1] The bond of nationality is an essential condition of the exercise by a State of the right to bring an international claim on behalf of the victim ; but the Court's Opinion states (p. 181) that there are important exceptions to this rule, and that there exist classes of cases in which protection may be exercised by a State on behalf of persons not having its nationality. Now the Permanent Court of International Justice, in reply to a similar objection, stated, in the above-mentioned Judgment of February 28th, 1939, that :

> "The Estonian agent both in the written pleadings and in the oral arguments has endeavoured to discredit this rule of international law, if not to deny its existence. He cited a certain number of precedents, but when these precedents are examined, it will be seen that they are cases where the governments concerned had agreed to waive the strict application of the rule, cases where the two governments had agreed to establish an international tribunal with jurisdiction to adjudicate on claims even if this condition as to nationality were not fulfilled."

On the other hand, the classes of cases envisaged in the Opinion seem to relate to the protection of the flag and of armed forces, in which case protection extends

It is thus by juridically identifying the national and his national State, that the latter is deemed to have the right to bring an international claim for reparation due to the victim or to persons entitled through him.

According to this theory, the State does not act as representative of its national, although it claims reparation for the damage suffered by him. But the reparation that it claims for this injury possesses the international character of reparation due from one State to another. In Judgment No. 13 of the P.C.I.J. (Series A., No. 17, pp. 27-28), we find a remarkable statement of this juridical theory in the following terms:

> "It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. This is even the most usual form of reparation; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."

The question, therefore, is whether, as regards injuries suffered by one of its agents in the performance of his duties, the Organization has a right to make an international claim at any rate of the same scope, if not of the same nature, as a claim made by a State.

In the preliminary part of the Opinion, devoted to a consideration of the question, the Court stated that:

> "(*d*) As this question relates to a case of injury suffered in such circumstances as to involve a State's responsibility, it must be supposed, for the purpose of the examination, that the damage results from a failure by the State to perform obligations of which the purpose is to protect the agents of the United Nations Organization in the performance of their duty."

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to everyone in the ship or in the forces, independent of nationality. But it must be pointed out that as the condition of nationality is satisfied as regards the flag or the forces, its absence, in the case of one or more units or persons of a national entity, may be held to be covered by a principle of the indivisibility of the flag or of the armed forces.

The Court therefore admits as a postulate the existence of an obligation in favour of the United Nations and incumbent on any Member State whose responsibility might be involved. But there is nothing in the terms of the question to authorize the admission of such a postulate; the clause "in circumstances involving the responsibility of a State" seems to refer only to the traditional conditions of diplomatic protection, namely the exhaustion of local remedies and the existence of a denial of justice (see debate in Committee VI of the United Nations General Assembly).

Has the Court in view the obligation of Members, under Article 2, paragraph 5, of the Charter, to give the United Nations every assistance in any action it takes in accordance with the Charter; or has it in view the obligations derived from Article 105 of the Charter, and from the Convention on Privileges and Immunities? A passage from the Opinion (p. 183) seems to refer to both of these obligations.

But, all the same, the Court has not endeavoured to discover the source of this obligation, although it is evident that the disregard by a State of an obligation, and the consequences that may follow, are closely dependent on the actual terms of the obligation.

But even whether the source of the supposed obligation be one or other of the above-mentioned provisions, it would still have to be shown that a breach of the obligation would give rise to a right of the United Nations to make an international claim for reparation of the damage caused by (*b*) of the first question; the right to claim reparation of the damage under (*a*) gives rise to no difficulty. If the existence of an obligation is assumed, this right would only be the direct result of this obligation.

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Both the written statements of the governments (except that of the United States Government) and the statements made in Court recognized that the United Nations had the right to bring an international claim in respect of the damage referred to under (*b*), and they endeavoured to give reasons for this. Each representative had his own argument.

They founded this right on one or more of the following grounds:

(1) The analogy between the position of the United Nations and that of States, because the general principles underlying the position of States would be equally applicable to the United Nations.

(2) Creation of a new situation, owing to the development of international organization; in this situation, the international

community requires that a step forward should be taken towards the protection of its agents.

(3) The rule that the reparation of damage suffered by the victim would habitually and principally be the measure of reparation due to the State, and consequently to the United Nations.

(4) Weakening of the bond of national allegiance implied in Article 100 of the Charter on the one hand, and by considerations of expediency on the other hand, there being no national protection for stateless persons, refugees and displaced persons, or such protection being illusory if, for any reason, the national State does not endeavour to exercise it.

(5) An international obligation to ensure protection of a foreign public service; this is confirmed by several precedents derived from the application of Articles 88 and 362 of the Treaty of Versailles, from the diplomatic history of the concert of European Powers in the Cretan question, and from the Corfu affair of 1923 (Tellini Affair).

(6) Article 100 of the Charter.

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Apart from the actual value of each of these arguments, their diversity gives rise to contradictions and inconsistency as regards the justification of the United Nations' right. Those who uphold certain arguments consider others inadequate or insufficient.

The Court was right to set aside the argument drawn from Article 100 (p. 182). Such an argument only justified the making of an international claim for the Secretary-General and the staff of the Secretariat, so that other grounds had to be found for the protection of agents other than the staff of the Secretariat.

It must be added that this Article, and especially paragraph 1, is only a rule of conduct or discipline for the Secretary-General and the staff of the Secretariat. It is a rule which would have been more in place in the Staff Regulations of the Secretariat, if it had not been desired to link it up to the second paragraph, which imposes an obligation on States, and if it had not also been required to justify the privileges and immunities provided in their favour by Article 105.

An official of the Organization who is a national of a particular State may, in one way or another, have to take part in discussions or decisions of the Organization, where actions and interests of the particular State are involved. This official might consequently find that his national feelings and his duties were in conflict in a particular case. It was therefore necessary to reassure States Members of the Secretariat's impartiality, and to define what would be the situation of the staff in such cases of conflict, and determine their duties. For this reason, in the first paragraph

of this Article, the staff are enjoined not to seek or receive instructions from any government or from any other authority external to the Organization. The following provision is a repetition of the same rule in a more extended form ; it also relates to the dignity of an international official position. The reference to the exclusive responsibility towards the Organization is a consequence and a necessary confirmation of the preceding rules.

The second paragraph of this Article only repeats the ideas underlying the first paragraph, as looked at from the viewpoint of the State of which the official is a national.

In these specific conditions of the nature of the Organization, its duties and powers, the provision implies nothing more than the relations between employer and employed in an international body. So much so that a similar provision is found in :

(1) the Agreement relating to the International Monetary Fund, September 27th, 1945 (Article 12, Section 4 (*c*)) ;
(2) the Agreement relating to the International Bank for Reconstruction and Development of the same date (Article 5, Section 5 (*c*)) ;
(3) the U.N.E.S.C.O. Charter, November 16th, 1945 (Article VI, Section 5) ;
(4) the constitution of the International Labour Organization (Article 9, Sections 4 and 5) ;
(5) the constitution of the World Health Organization (Article 37) ;
(6) the constitution of the Food and Agriculture Organization of the United Nations (Article 8, Section 2) ;
(7) the constitution of the International Refugee Organization (Article 9, Section 3) ;
(8) the Convention on International Civil Aviation (Article 59) ;

(9) the constitution of the International Trade Organization (Article 88, Sections 1, 2, 3).

In these circumstances, would it be conceivable that the constitutions of all these Specialized Agencies can have created so many allegiances involving a right of protection for their staff similar to that accorded by States to their nationals ?

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What is to be said of the other arguments ?

The Court rejects in general any argument by analogy from the traditional rule of international law as to the diplomatic protection of nationals abroad (p. 182). In this way, it rejects the alleged allegiance resulting from Article 100, which would take the place of nationality for the purpose of the exercise of the right above

mentioned. But surely the following reasoning of the Court is only an argument by analogy, namely :

1° that if one goes back to the principle contained in the rule of the nationality of the claim, one observes that, for an international claim on behalf of an individual to be made by a State, a breach by the State claimed to be responsible of an obligation incurred towards the claimant State must be alleged, and

2° that this principle leads to recognizing that the Organization has the capacity to bring an international claim for injuries suffered by its agent, if the Organization gives as a ground for its claim a breach of an obligation incurred towards it (pp. 181 and 182).

It is true that when the Court relies on the principle mentioned above and implied in the rule of the nationality of the claim, and when it secondly relies on the existence of important exceptions to that rule, and when it lastly relies on the new situation created by the coming into existence of the United Nations, it only draws the conclusion that a negative reply to Question I (*b*) cannot be deduced from that rule. But that conclusion is only a part of the Court's argument in favour of the Organization's right to make an international claim for the damage referred to in I (*b*). Whether this argument be considered as preliminary or auxiliary, or whether it be given a greater importance, it is in any case only an argument by analogy in favour of an affirmative reply, and draws its elements from the new situation, from the identity of the basic principle of the situations compared, and from the relative and in no way rigid character of the rule of nationality.

But in international law, recourse to analogy should only be had with reserve and circumspection. Contrary to what is the case in municipal law, and precisely owing to the principle of State sovereignty, the use of analogy has never been a customary technique in international law.

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In any case, this argument by the Court brings us to the international obligation which the Court regards as involved in this question, and which seems to be the foundation for the above-mentioned argument by analogy.

It has been asked whether this obligation was derived from Article 2, paragraph 5, of the Charter, or from Article 105. But it is evident that the first of these two provisions, which creates a definitely political obligation, could not, if that obligation were infringed, serve to found a right to make a claim for reparation due to the victim. This right presupposes a definite relation between the

victim and the Organization, which cannot be deduced from this general political obligation.

Nor can a foundation be discovered in Article 105. For it is a rule that in so far as diplomatic privileges and immunities impose on a State a duty of special diligence, they only authorize and justify a claim for reparation for damage caused to the State which accredited the victim. So much so that in the case of a consul who was not a national of the claimant State, the right of that State would be limited to direct damage. On the other hand, in the case of a diplomatic representative, a combination of his rights as representative and as national enables reparation due to the victim to be included in the international claim.

On the other hand, it must be observed that :

(1) Article 105 accords privileges and immunities only to officials of the Organization ; this term does not necessarily coincide with that of agent, as the Court has pointed out ; i.e., it has not the same meaning or scope ;

(2) Article 105 does not apply exclusively to the Organization. All the constitutions of the Specialized Agencies contain provisions declaring it to be applicable, or provisions in the same terms.

By connecting up the right to claim reparation due to victims with an obligation derived from provisions of such a nature, situations would be arrived at that are contrary to those admitted by international law in regard to master and servant. The result would also be a generalization, in the interest of all the Specialized Agencies, of a right which has hitherto belonged only to States ; the history of this right is closely connected with the notion of nationality, and it draws from that notion a fictitious identification between State and national.

The political character of the Organization and its importance in the hierarchy of international bodies cannot be pertinent in this case, nor can it justify the granting to the Organization, to the exclusion of other bodies, of a right not derived from a provision common to all.

This argument that the right to make an international claim is based on the recognition by a State of its obligation to respect the public services of another State, was upheld by the French Government's representative, who considered that "a State's international responsibility is involved if the protection prescribed by international law for diplomatic and consular services is not provided. The person of a diplomatic agent must be the subject of special vigilance on the part of the State that receives the agent. If this vigilance is lacking, and damage results, the State whose diplomatic service is concerned can make an international claim." It would further seem that damage referred to in Question I (*a*)

and that in (*b*) are both included in this claim. The French representative mentioned several precedents in support of this argument ; but in truth none of them is conclusive.

On the other hand, the United Kingdom representative thought that the bond of service, as opposed to that of nationality, only gives the State the right to make an international claim for the damage directly suffered by it, i.e., damage referred to in Question I (*a*) ; and he maintained that it was the insufficiency of this argument to justify a claim for reparation referred to in Question I (*b*) which led to the search for another argument. He claimed to find this in Article 100, which the Court thought was not pertinent.

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I have enquired into all the details of this obligation of protection, as found in the arguments of the representatives of governments and of the Secretary-General, because it was adopted by the Court itself at the beginning as a hypothesis. Then the Court found itself faced with a new situation—that the Charter did not expressly say that the Organization was entitled to include in its claim reparation for injury suffered by the victim or persons entitled through him. The Court then invoked a principle of international law said to have been applied by the P.C.I.J. to the International Labour Organization, to the effect that "the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties".

In application of this principle, the Court states that in order to ensure the efficacious and independent exercise of its duties and to secure effective support for its agents, the Organization must give them suitable protection, and after asserting that it is essential that the agent shall be able to count on this protection without having to count on other protection (particularly that of his own State), the Court concludes that it is evident that the capacity of the Organization to exercise *a certain measure of functional protection* arises by intendment out of the Charter.

As this measure is not fixed, the Court adopts the juridical construction given by the Permanent Court to a claim by a State for reparation due to its national, and asserts "in claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization".

I regret I cannot accept this conclusion.

In the first place, I do not think that Opinion No. 13 of the P.C.I.J. concerning the competence of the International Labour Organization lays down the principle so categorically and absolutely as a principle of international law, as the Court states. The Permanent Court had to give an opinion on the question whether a certain measure recommended by the International Labour Organization was or was not within the Organization's competence; and it stated that "the terms in which the objects committed to the International Labour Organization are stated are so general that language could hardly be more comprehensive", and that "while the competence .... so far as concerns the investigation and discussion of labour questions and the formulation of proposals .... is exceedingly broad, its competence is almost entirely limited to that form of auxiliary activity." The Permanent Court therefore concluded in the following terms:

> "It results from the consideration of the provisions of the Treaty that the High Contracting Parties clearly intended to give to the International Labour Organization a very broad power of co-operating with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. The Organization, however, would be so prevented if it were incompetent to propose for the protection of wage earners a regulative measure to the efficacious working of which it was found to be essential to include to some extent work done by employers."

This Opinion therefore laid down no general principle. It only interprets the intention of the Parties as to Part XIII of the Treaty of Versailles in the light of the terms generally used therein.

If we admit that the principle proclaimed by the Court is a rule of judicial interpretation and not a recommendation of legislative policy, it would still have to be shown that the *suitable protection* to be afforded by the Organization to its agent is precisely *the right to claim the reparation due to him.* This right is evidently not the only suitable method of protection. We know, on the other hand, that the protection which a State owes to its national does not consist in a right of this nature derived from the mere notion of protection; thanks to the additional help of an ingenious juridical theory, based on nationality, it has identified the State with its national, and it considers that reparation due to the latter forms the measure of reparation due to the State. For this reason, the Court had to establish a link between the necessity for protection, and the right to claim the reparation due to the agent; namely, the capacity to exercise a certain measure of functional protection and the obligation to "make adequate reparation".

But the transfer by the Court (p. 184) of the terms used by the Permanent Court in respect of the State and its national, to the Organization and its agents, is a mere affirmation and remains unproved.

It must further be noted that if the Organization must afford this protection in the same way as a State must do for its national (and there is no reason why this should not be so), its right of action against the State responsible can only arise after its agent has exhausted all municipal remedies, and has met with a denial of justice.

But having regard to the situation of an agent of the Organization who is bound to it by a contract in one form or another, the most appropriate and indeed efficacious protection is certainly the reparation which could be granted him by the Organization, which could recover the sum in question from the State responsible.

The only conclusion to be drawn from the foregoing considerations is that the juristic interpretation cannot afford a basis in accordance with the general principles of law, nor one affording an acceptable or satisfactory solution.

I have noted the various suggestions made by governments. The Court has not accepted them, or has accepted only one—namely, the breach of obligations of which the object is to protect agents of the Organization in the exercise of their duties, an obligation which the Court, for that matter, has presumed to exist. But in order to deduce a reply to question I (*b*), the Court had to complete its answer by other propositions which it simply affirmed and, in my view, never established. Inevitably, solutions of an abstract and general character, like functional protection, adopted by the Court, would then be the most extreme. Thus, the Court holds that the Organization has the capacity to make an international claim for reparation due to any agent (in the widest sense of the term) against a State Member or not member of the Organization. As regards this latter case, it may be asked what are the conditions in which the obligation to protect the agent, that the Court assumed to be contained in the Request for the Opinion, can arise. The Organization has even the capacity to make a claim against the national State of the victim itself.

In short, it is impossible to avoid this diversity of arguments or the contradictory solutions arising therefrom, when a rule is removed from the framework in which it was formed, to another of different dimensions, to which it cannot adapt itself as easily as it did to its proper setting. In any case, the new construction would necessarily be artificial and, with the best will of the world, could not entirely satisfy the new requirements.

Suitable rules must be created. A special study of the question would no doubt reveal all the circumstances of fact and the numerous cases in which the question may arise, and the practical

solution that should be given to these various cases in different circumstances. On these data can be built an appropriate juridical construction.

It matters little that the interpretation of the rules of international law in force is in accordance or not with the solutions, so long as the unanimous desire of the General Assembly is to provide a maximum of protection for the agents of the Organization, in the widest sense, and not only for members of the Secretariat.

The Court's duty is to declare the law in the state of evolution that it has reached ; and the Court cannot, in any case, in the presence of new complex and varied cases and contingencies, permit the simple and homogeneous rules, customarily recognized as international law in force, to be the appropriate juristic expression of such situations and contingencies.

According to the rules in force, the Organization has the capacity to make international claims, when one of its agents (in the widest sense) has suffered injury in the performance of his duty, for the damage referred to in Question I (*a*). This damage may include the damage suffered by the victim, in so far as this was provided for in the contract of service. But there is nothing to prevent temporary agents, mediators or members of commissions from entering into contracts for reparation due to them in the event of injury sustained in the performance of their duties, whenever the nature of their duties or missions obliges them to expose themselves to danger in the territories of States where they may have to perform these duties or carry out these missions.

This form of reparation will be for the interested parties more direct, more effective and more immediate than any right of making an international claim that might be accorded to the Organization on their behalf.

My reply is therefore *yes* to Question I (*a*), and *no* to Question I (*b*).

In view of the reply to question I (*a*), the second Question does not arise.

(*Signed*) BADAWI PASHA.