DISSENTING OPINION BY JUDGE ZORIČIĆ

[*Translation*]

I am in entire agreement with the Court's opinion that matters concerning the observance of human rights certainly do not fall within the ambit of the Questions contained in the Request for an Opinion. Similarly, I agree that the objection to the Court's jurisdiction, raised by several States, and which is based on the argument that the Questions put to the Court relate to a subject falling exclusively within the domestic jurisdiction of the State (Article 2, paragraph 7, of the Charter), is ill-founded and cannot be upheld.

What prevents me, to my regret, from agreeing with the majority of the Court is entirely a question of principle. In my view, the Court should have declared that it was unable to answer the Questions put to it, for the reasons which follow :

The Questions put to the Court are worded as follows :

> "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 ?
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> 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 Question I, the Court is asked to give its opinion in the first place as to the existence of a dispute, which is a simple issue of fact, and, next, on the question whether that dispute is to be regarded as a dispute subject to the provisions of Articles 36, 38 and 40, respectively, of the Treaties of Peace with Bulgaria, Romania and Hungary ; that is a question of law.

Question II is entirely a question of law relating to the existence of an international obligation for Bulgaria, Romania and Hungary to execute Articles 36, 38 and 40 of the Peace Treaties and in particular to appoint their representatives to the Commissions provided for in those articles.

The documentation submitted to the Court shows that a divergence of views between the United States of America and the United Kingdom, on the one hand, and Hungary, Romania and Bulgaria, on the other hand, concerning the application of the Treaty provisions relating to human rights, gave rise to another dispute, the subject of which, and its *fundamental issue*, is not only whether a dispute does or does not exist, but whether a dispute exists of such a nature that the procedural clauses of the Peace Treaties are applicable to it.

Such a development, in which an original dispute gives rise to a second, a third, and other disputes, is not a novel feature in international affairs. It cannot, however, be maintained that, from a legal point of view, the original dispute is of greater importance than those to which it gives rise. In each of the subsequent disputes the States which are in dispute may adopt legal positions independently of their attitude in regard to the original dispute; the solution of each of them produces effects of its own, and the States concerned are the only judges of the importance—to them—of the solution reached.

It is beyond question that, in this case, the Request for an Advisory Opinion relates to a dispute between States, and it is common ground that it is not concerned with the dispute about the observance of human rights. On the contrary, Question I asks the Court to give its opinion on a new dispute which concerns the applicability of the procedural clauses of the Peace Treaties. The subject-matter of this new dispute is thus clearly something independent of the former dispute relating to the observance of human rights. In order to be in a position to answer this Question, the Court must undertake the interpretation of Articles 36, 38 and 40 of the Peace Treaties. The fact that such an interpretation may be very simple and very easy has no relevance whatever from the standpoint of the principle involved. In any case, the Court's reply necessarily deals with the essential issue of the present dispute, and, whether that reply be in the affirmative or in the negative, it cannot avoid settling the merits of the dispute, or, in other words, deciding the sole question now in dispute, namely the applicability of Articles 36, 38 and 40 of the Peace Treaties. Accordingly, this dispute is definitively settled by the Opinion and the legal relations between the States in dispute are, so far as concerns that question, decided by the authority of the Court. In other words: Question I has transferred to the Court the actual decision of the dispute between the parties, and the Court, by its Opinion, has pronounced upon the international obligations of Bulgaria, Hungary and Romania, although those States had not given their consent to the proceedings before the Court.

Now, it is a fundamental rule of international law that no State can be compelled to submit its disputes with other States to any procedure, judicial or otherwise, without its consent. That legal rule

is founded on the principle of the sovereign equality of States, a principle which is the corollary of independence and which is expressly recognized by the Charter of the United Nations (paragraph 1 of Article 2).

The considerations which follow are designed to show that this rule applies not only to the Court's Judgments but also to its Advisory Opinions.

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The Statute and the Rules of Court show that this Court's advisory function is a continuance of the advisory function of the Permanent Court of International Justice (hereinafter called the P.C.I.J.). Consequently, and having regard to the fact that the provisions of the Statute and the Rules of the present Court are essentially the same as those of the Statute and Rules of the former Court, it follows that these provisions may be applied in the light of the experience and practice of the P.C.I.J.

It will suffice to explain briefly that the P.C.I.J. had, at the outset, considered the States interested in Advisory Opinions simply as furnishing information, but it very soon perceived that the position of the States was substantially different in cases where an Advisory Opinion related to a dispute actually existing between States. It was impossible not to admit that, in such cases, the States in dispute were really parties before the Court and that they must be given a position similar to that of parties in a contentious case. Consequently, the Rules of Court were adapted to this need and, when the Statute was revised, a new Article 68 was introduced laying down that the provisions of the Statute relating to contentious cases were to be applied to the extent to which the Court recognized them as applicable.

Article 68, which was inserted bodily in the present Court's Statute, is of great importance in determining the position of States engaged in a dispute which is brought before the Court by way of a Request for an Advisory Opinion. In that connexion, it should be noted that Article 68 of the Statute has an imperative character. It is true that the Court has power to examine whether or not certain provisions governing contentious cases are applicable in a given case ; but applicability is an objective criterion, and if the Court finds that a clause is applicable, it is obliged to apply it. That is made clear, not only by the actual words of Article 68, but also by the very clear and express explanations that were given on the occasion of the revision of the Court's Statute in the report by the Jurists' Committee of the League of Nations (L.N. C/166/M/66. 1929. V, p. 117), and in the letter sent to the President of the Assembly by the President of the Conference of States signatories of the Statute (L.N. C/154/M/173. 1929. V, p. 79).

In view of these facts, it seems to me beyond doubt that the position of States in dispute is, even in advisory matters, the same

as that of parties before the Court. They have an indisputable right to submit statements, to furnish and to demand evidence, to dispute the allegations of the opposing party, and they are even entitled to have a judge on the bench (Article 83 of the Rules of Court). It follows that a request for an opinion cannot be regarded as giving rise solely to a relation between the Court and the international organ which asks for the Opinion, but that, on the contrary, in addition to that relation, other relations may be established first, between the Court and the parties, and, again, between the parties themselves. (Cf. Negulesco : "L'évolution de la procédure des avis consultatifs de la C. P. J. I.", *Recueil des Cours*, Vol. 57.)

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The position of States in dispute being thus established, in my view, as that of parties before the Court, it is desirable to examine the effects which an advisory opinion relating to a legal question actually pending between States (Article 82 of the Rules of Court) may produce upon the said States.

It is clear that an advisory opinion is, in its legal nature, different from a judgment. In a judgment, which is always the result of a contentious case, the Court decides all the issues in dispute, the judgment is unappealable and becomes *res judicata*, so that the rights and obligations of the States are legally and definitively established.

Advisory opinions, on the other hand, are given at the request of an international organ authorized to ask for them ; the Court gives its answer to the questions put to it, but the opinion possesses no binding force.

This is certainly the difference between a judgment and an advisory opinion, regarded from a formal and strictly legal point of view. In actual life, however, the matter often assumes a very different aspect and it may be said that, in practice, an advisory opinion given by the Court in regard to a dispute between States is nothing else than an unenforceable judgment. The first reason is that, in such a case, the procedure normally follows the same course as in an actual contentious case. The States parties to the dispute submit written and oral statements, the case is argued in open Court, the full Court deliberates, the national judges take part in the deliberations of the Court and in the voting and, finally, the opinion is read out at a public sitting and printed in the Court's publications exactly in the same way as a judgment.

Secondly, the Court's advisory opinions enjoy the same authority as its judgments, and are cited by jurists who attribute the same importance to them as to judgments. The Court itself refers to its previous advisory opinions in the same way as to its judgments.

Thirdly, an advisory opinion which is concerned with a dispute between States from a legal point of view amounts to a definitive

decision upon the existence or non-existence of the legal relations, which is the subject of the dispute. It follows that the opinion cannot fail to exercise very great influence on the respective legal positions of the States, all the more so because the opinion may be used as a means of psychological pressure upon the governments of the States concerned.

It is for these very reasons that States have always objected to their cases, their disputes, the positions they have adopted and the interests thereby involved being discussed and decided by a court of justice without their consent. It will suffice in this connexion to refer to the fifth reservation of the United States of America in regard to the accession of the United States to the Protocol of Signature of the Statute of the P.C.I.J. It was worded as follows:

> ".... Nor shall it [the Court] without the consent of the United States entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest." (L.N. C/166/M/66. 1929. V, p. 97.)

That reservation by the United States was in accord with a precedent of the highest importance, namely the reply given by the P.C.I.J in the Eastern Carelia case. It seems worth while to refer briefly to that reply as the legal rules which it lays down are of special interest in the present case.

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Having received a Request for an Opinion on a dispute between Finland and Russia concerning the interpretation of certain clauses, and being confronted by a refusal on the part of Russia to consent to the proceedings, the P.C.I.J. declared that 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 any other kind of pacific settlement".

After going on to mention the possible circumstances in which consent may be given, the P.C.I.J. concluded:

> "Such consent, however, has never been given by Russia. On the contrary, Russia has, on several occasions, declared that it accepts no intervention by the League of Nations in the dispute with Finland. The refusals which Russia had already opposed to the steps suggested by the Council have been renewed upon the receipt by it of the notification of the request for an advisory opinion. *The Court therefore finds it impossible to give its opinion on a dispute of this kind.*" (Series B, No. 5, p. 28.)

From the last statement, which I have underlined, it is clearly apparent that the above-mentioned rule of international law

sufficed, by itself, to enable the P.C.I.J. to say that it found it impossible to give an answer. It is true that the Court gave "other cogent reasons", but these are only supplementary reasons which are mentioned in order to strengthen, by considerations of practical expediency, a decision which was already well-founded on the legal rule that was decisive in the case.

The precedent of Eastern Carelia constitutes, in my view, a convincing proof that the consent of the States is necessary, not only in regard to contentious cases, but also in advisory cases where the request for the opinion relates to a dispute between States, so that the answer of the Court would decide the issue that is the subject of the dispute.

It is also necessary to emphasize the fact that the P.C.I.J. gave that decision in the Eastern Carelia case, in spite of the fact that, at that time, there was no rule in existence compelling it to apply the provisions of the Statute applicable to contentious cases. On the contrary, it was actually as a result of that decision, which was generally admitted to be sound, that Article 68 of the Statute was subsequently introduced: "thus establishing in such a way as to protect against any disposition to change it, even on the part of the Court, the doctrine which inspired its reply in the Eastern Carelia case". (Hammarskjöld: *Juridiction internationale, "in memoriam"*, Leyden, 1938, p. 285.)

The present case offers a striking analogy to the Eastern Carelia case. To begin with, in the present case, the subject-matter of the Advisory Opinion is also the interpretation of a treaty and the existence of certain international obligations arising under that treaty, so that the Court's answer is substantially equivalent to deciding the dispute between the parties which is now before the Court; secondly, in both cases, one of the parties to the dispute refused to take part in the debates in the international organization which subsequently requested the Opinion. Thirdly, in both cases, one of the parties is not a member of the international Organization and, finally, one of the parties to the dispute contests the right of the Court to give an Opinion in the case without its consent.

Very naturally, this analogy did not escape the notice of the parties who appeared before the Court, and they were at special pains to show that the theory based on that precedent was not applicable to the present case because, in the first place, the present dispute merely related to the clauses of the Peace Treaties concerning certain procedure and not to the disputes about human rights which gave rise to the first difference of opinion; and, secondly—as they contended—because the Court is not obliged to adhere to precedents.

I am unable to agree with these views.

From a legal standpoint, any dispute between States must be treated as such, without regard to the degree of practical importance

which the solution of the dispute may present—that being, moreover, a matter of which those States are the best judges. The States are entitled to maintain the legal positions—whether good or bad—which they have adopted, and it would evidently be very difficult to draw a line of demarcation between important disputes and other disputes. Once a dispute occurs, no matter what its subject, the States are entitled to insist that it should not be subjected to any procedure for settlement without their consent.

On the other hand, it is quite true that no international court is bound by precedents. But there is something which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so long as the principle retains its value.

But the principle of the sovereign equality of States, and the rule of law which follows from it and which was applied in the case of Eastern Carelia, have lost nothing of their value. The great majority of States have consistently opposed any kind of obligatory jurisdiction. The Court should not therefore, in my opinion, allow disputes between States to be submitted to it in an indirect fashion by way of requests for an advisory opinion. In regard to that point, the reasons and the needs of the organ which requested the Opinion cannot be brought into account, for, as the P.C.I.J. stated in the above-quoted case :

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

The Court should therefore, in my opinion, avail itself of the discretionary power conferred on it by Article 65 of its Statute and state that it finds it impossible to give an Opinion on the two Questions.

(*Signed*) ZORIČIĆ.