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

Advisory Opinion of 18 July 1950

The advisory opinion summarized here deals with the second phase of the question concerning the Interpretation of Peace Treaties signed with Bulgaria, Hungary and Romania. By a Resolution of October 22nd, 1949, the General Assembly of the United Nations had submitted to the Court for advisory opinion the following four questions:

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

In the event of an affirmative reply to Question I:

"II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the Articles referred to in Question I, including the provisions for the appointment of their representatives to the Treaty Commissions?"

In the event of an affirmative reply to Question II and if within thirty days from the date when the Court delivers its opinion, the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice:

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

In the event of an affirmative reply to Question III:

"IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a

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Commission, within the meaning of the relevant Treaty articles, competent to make a definitive binding decision in settlement of a dispute?"

On March 30th, 1950, the Court answered the first two questions by saying that diplomatic exchanges disclosed the existence of disputes subject to the Treaty provisions for the settlement of disputes and that the Governments of Bulgaria, Hungary and Romania were under obligation to appoint their representatives to the Treaty Commissions.

On May 1st, 1950, the Acting Secretary-General of the United Nations notified the Court that, within 30 days of the date of the delivery of the Court's Advisory Opinion on the first two questions, he had not received information that any one of the three Governments concerned had appointed its representative to the Treaty Commissions.

On June 22nd, 1950, the Government of the United States of America sent a written statement. The United Kingdom Government had previously stated its views on Questions III and IV in the written statement submitted during the first phase of the case.

At public sittings held on June 27th and 28th, 1950, the Court heard oral statements submitted on behalf of the Secretary-General of the United Nations by the Assistant Secretary-General in charge of the Legal Department and on behalf of the Government of the United States of America and of the Government of the United Kingdom.

In its opinion the Court said that, although the literal sense did not completely exclude the possibility of appointing the third member before appointing both national commissioners, the natural and ordinary meaning of the term required that the latter be appointed before the third member. This clearly resulted from the sequence of events contemplated by the Article. Moreover, it was the normal order in arbitration practice and, in the absence of any express provision to the contrary, there was no reason to suppose that the parties wished to depart from it.

The Secretary-General's power to appoint a third member derived solely from the agreement of the parties, as expressed in the disputes clause of the treaties. By its very nature such a clause was to be strictly construed and could be applied only in the case expressly provided thereby. The case envisaged in the Treaties was that of the failure of the parties to agree upon the selection of the third member and not the much more serious one of a complete refusal of cooperation by one of them, taking the form of refusing to appoint its own Commissioner.

A change in the normal sequence of appointments could only be justified if it were shown by the attitude of the parties that they desired such a reversal to facilitate the constitution of Commissions in accordance with the terms of the Treaties. But such was not the present case. In these circumstances the appointment of the third member by the Secretary-General, instead of bringing about the constitution of a three-member Commission provided for by the Treaties, would result only in the constitution of a two-member Commission, not the kind of Commission for which the Treaties had provided. The opposition of the one national Commissioner could prevent the Commission from reaching any decision. It could decide only by unanimity, whereas the disputes clause provided for a majority decision. There was no doubt that the decisions of a two-member Commission, one of which was designated by one party only, would not have the same degree of moral authority as those of a three-member Commission.

In short, the Secretary-General would be authorized to proceed to the appointment of a third member only if it were possible to constitute a Commission in conformity with the Treaty provisions.

The Court had declared in its Opinion of March 30th that the Governments of Bulgaria, Hungary and Romania were under an obligation to appoint their representative to the Treaty Commissions. Refusal to fulfil a Treaty obligation would involve international responsibility. Nevertheless, such a refusal could not alter the conditions contemplated in the Treaties for the exercise of the Secretary-General's power of appointment. These conditions were not present in this case and their lack was not supplied by the fact that their absence was due to the breach of a Treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties was one thing; international responsibility another. One could not remedy the breach of a Treaty obligation by creating a Commission which was not the kind of Commission contemplated by the Treaties. It was the Court's duty to interpret Treaties, not to revise them.

Nor could the principle that a clause must be interpreted so as to give it practical effect justify the Court in attributing to the provisions a meaning which would be contrary to their letter and spirit.

The fact that an arbitration commission may make a valid decision although the original number of its members is later reduced, for instance, by withdrawal of one of the arbitrators, did not permit drawing an analogy with the case of the appointment of a third member by the Secretary-General in circumstances other than those contemplated in the Treaties, because this raised precisely the question of the initial validity of the constitution of the Commission.

Nor could it be said that a negative answer to Question III would seriously jeopardize the future of the many similar arbitration clauses in other treaties. The practice of arbitration showed that, whereas draftsmen of arbitration conventions often took care to provide for the consequences of the inability of the parties to agree upon the appointment of a third member, they had, apart from exceptional cases, refrained from contemplating the possibility of a refusal by a party to appoint its own Commissioner. The few Treaties containing express provisions on the matter indicated that the signatory States in those cases felt the impossibility of remedying the situation simply by way of interpretation of the Treaties. In fact, the risk was a small one as, normally, each party had a direct interest in the appointment of its Commissioner and must, in any case, be presumed to observe its Treaty obligations. That this was not so in the present case did not justify the Court in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties had made no provision.

For those reasons the Court decided to answer Question III in the negative and therefore it was not necessary for it to consider Question IV.

The Court's answer was given by 11 votes to 2.

Judge Krylov, while joining in the conclusions of the Opinion and the general line of argument, declared himself unable to concur in the reasons dealing with international responsibility as, in his opinion, this problem went beyond the scope of the question put to the Court.

Judge Read and Azevedo appended statements of their dissenting opinions.