SEPARATE OPINION OF JUDGE ODA

Permanent Court of International Justice — Article 36, paragraph 2, of the Court's Statute — Optional clause — Commonwealth nations reservation — General Act for the Pacific Settlement of International Disputes — Assembly resolution of 2 October 1924 — 1924 Protocol for the Pacific Settlement of International Disputes — Assembly resolution of 26 September 1928 — Article 17 of the 1928 General Act — Accession to the 1928 General Act.

1. I fully support the Court's finding that it has no jurisdiction to entertain the Application filed by Pakistan on 21 September 1999 (instituting proceedings against India in respect of a dispute relating to the destruction, on 10 August 1999, of a Pakistani aircraft) on any of the bases asserted by Pakistan as grounds for the Court's jurisdiction: (i) Article 17 of the General Act of 1928; (ii) the declarations made by both Parties pursuant to Article 36, paragraph 2, of the Court's Statute; and (iii) paragraph 1 of Article 36 of the Court's Statute.

2. I would, however, like to shed light on the General Act of 1928, on which Pakistan relies as one of the grounds for the Court's jurisdiction and which the Court rejects as such.

Pakistan claims that British India (India) acceded to that Act on 21 May 1931 and that Pakistan itself acceded to that Act by automatic succession pursuant to international customary law. The Court, without finding it necessary to decide the issue of whether the General Act of 1928 itself is still in force, states that "India cannot be regarded as a party to the [General Act of 1928] at the date when the Application in the present case was filed by Pakistan" and concludes that "the Court has no jurisdiction to entertain the Application on the basis of the provisions of Article 17 of the General Act of 1928" (see Judgment, paras. 13-28).

I do not disagree with the Court's reasoning rejecting Article 17 of the General Act of 1928 as a basis for the Court's jurisdiction. I, however, see the General Act, which in Pakistan's view is a basis for the Court's jurisdiction, from a different angle.

3. I believe, for my part, that from the outset, the General Act of 1928 could not itself be considered a document which would confer compulsory jurisdiction upon the Court independently from or in addition to the "optional clause" under Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice. This is the point on which

I take issue with the reasoning adopted by the Court in ruling that Article 17 of the General Act of 1928 cannot constitute a basis of the Court's jurisdiction.

It is pertinent in this respect to take a brief look at how and in what circumstances the General Act, which Pakistan cites as grounds for the Court's jurisdiction, was drafted in 1928 and the related issue of the manner in which the concept of the compulsory jurisdiction of the Permanent Court has developed.

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4. The Statute of the Permanent Court of International Justice (as approved by the Assembly of the League of Nations on 13 December 1920) entered into force on 2 September 1921 after the "Protocol of Signature of the Statute for the Court" had been ratified by a majority (namely, 27 States) of the Members of the League of Nations (note: the First Annual Report of the Permanent Court shows, on page 124, that 48 Members of the League of Nations had signed the Protocol by 1 June 1925).

Article 36 of the Statute, dealing with the Court's jurisdiction, provides in its paragraph 2 that:

> "The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:
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> *(a)* The interpretation of a Treaty;
> *(b)* Any question of International Law;
> *(c)* The existence of any fact which, if established, would constitute a breach of an international obligation;
> *(d)* The nature or extent of the reparation to be made for the breach of an international obligation."

The States parties to the Court's Statute could make declarations under Article 36, paragraph 2, the model of which was worded in the Protocol of Signature of the Court as follows:

> "Optional Clause
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> The undersigned, being duly authorised thereto, further declare, on behalf of their Government that, from this date, they accept as compulsory *ipso facto* and without special Convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions . . ."

5. Not many States, in fact, made this declaration in the first few years

after the Permanent Court was set up. Information maintained by the League of Nations in its early days varied according to the documents consulted. However, the first four volumes of the *Annual Report of the P.C.I.J.*, taken as a whole, would seem to indicate that the following States successively made declarations and became bound by the "optional clause" within a few years of adoption of the Court's Statute: Austria 1921; Denmark 1921; Switzerland 1921; Netherlands 1921; Bulgaria 1921; Sweden 1921; Uruguay 1921; Norway 1921; Portugal 1921; Haiti 1921; Finland 1922; Lithuania 1922; and Estonia 1923 (see the *Fourth Annual Report*, pp. 120, 416).

This list may not be entirely accurate or complete due to unclear source information, which is conflicting even in the Permanent Court's documents. Yet it was evident that the number of such States making the declaration was not large when compared with the total number of some 50 States that were parties to the Statute of the Permanent Court.

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6. In these circumstances the Assembly of the League of Nations, in its fifth session in 1924, in order to facilitate acceptance of the compulsory jurisdiction of the Court by as many countries as possible, replied to the question of the legality of making a reservation to the "optional clause". On 2 October 1924 the Assembly passed a resolution in which it considered that "the study of the . . . terms [of Article 36, paragraph 2] shows them to be sufficiently wide to permit States to adhere to the special Protocol, opened for signature in virtue of Article 36, paragraph 2, with the reservations which they regard as indispensable" and recommended States to accede at the earliest possible date to the optional clause (*League of Nations Official Journal, Special Supplement No. 23*, p. 225; see p. 497: (Annex 30), Annex I (2) to A.135.1924).

7. In parallel with this resolution of 2 October 1924, the Assembly recommended on the same day that all Members of the League of Nations accept the "Protocol for the Pacific Settlement of International Disputes" which the Assembly had drafted out of the desire to "facilitat[e] the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between States". Article 3 of the "1924 Protocol" reads:

> "The Signatory States undertake to recognise as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but without prejudice to the right of any State, when acceding to the [optional clause] to make reservations compatible with the said clause." (*Ibid.*, p. 225: see p. 498 (Annex 30a), Annex II to A.135.1924.)

On reading this text it is clear, however, that the 1924 Protocol was *not* drafted in order to have the States parties *directly bound* by the compulsory jurisdiction of the Court *but* rather to *encourage* more States to accept the "optional clause" of the Court's Statute without prejudice to the rights of States to make reservations they regarded as indispensable. The drafters of the Protocol apparently did not consider that those States unwilling to adhere to the compulsory jurisdiction of the Court by accepting the "optional clause" of the Statute would in any case assume anew the same obligation simply by acceding to the 1924 Protocol.

Both the resolution mentioned in paragraph 6 above and another resolution to which the "1924 Protocol" was annexed dealing with what the Assembly contemplated under a single subject-heading, namely, "Arbitration, Security and Reduction of Armaments: Protocol for the Pacific Settlement of International Disputes", were intended to facilitate adherence to the "optional clause" of the Court's Statute by allowing States to make whatever reservations they regarded as indispensable. They were voted on together by roll-call and were passed by the unanimous vote of the 48 delegates present.

8. In fact, in the first few years after 1924, only a few States (namely, Belgium 1926; Ethiopia 1926; and Germany 1928) were to make declarations under the "optional clause" in response to the appeal in the resolution that "States accede at the earliest possible date" to that clause; the "1924 Protocol" was not ratified by even one State and thus did not come into force.

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9. The Assembly in its ninth session in 1928 reiterated its appeal to States to make declarations to accept the compulsory jurisdiction of the Court. In a Resolution adopted on 26 September 1928 regarding the optional clause of Article 36 of the Court's Statute, the Assembly referred to the 1924 Resolution, which, in its view, "ha[d] not so far produced all the effect that [was] to be desired". The Assembly was of the opinion that "in order to facilitate effectively the acceptance of the clause in question, it is expedient to diminish the obstacles which prevent States from committing themselves" and was further convinced that

> "attention should once more be drawn to the possibility offered by the terms of that clause to States which do not see their way to accede to it without qualification, to do so subject to appropriate reservations limiting the extent of their commitments, both as regards duration and as regards scope".

The Assembly recommended that "States which have not yet acceded to the optional clause of Article 36 of the Statute . . . should, failing acces-

sion pure and simple, consider, with due regard to their interests, whether they can accede on the conditions above indicated" (*League of Nations Official Journal, Special Supplement No. 64*, p. 182; see p. 491).

10. Thus, within less than ten years of the founding of the Permanent Court, reservations to the jurisdiction of the Court had become permissible in order to encourage States to accept the Court's compulsory jurisdiction.

A fairly large number of States acceded to the "optional clause" with various types of reservation appended. By 1939, the total number of States which had ratified the "optional clause", and were thus bound by it, was 29. These declarations, each accompanied by various types of reservation, are found in the Annual Reports of the Permanent Court.

India, as one of these States, made a declaration on 19 September 1929 reading:

> "On behalf of the Government of India and subject to ratification, I accept as compulsory *ipso facto* and without special convention on condition of reciprocity the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification:
>
> other than . . . disputes with the government of any other Member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree . . .". (*Sixth Annual Report of the Permanent Court of International Justice (June 15th, 1929-June 15th, 1930)*, p. 482.)

India's accession to the "optional clause" with the Commonwealth reservation was identical to those of Great Britain (19 September 1929) and other Commonwealth nations such New Zealand (19 September 1929), the Union of South Africa (19 September 1929), Australia (20 September 1929), and Canada (20 September 1929).

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11. In parallel with the above-mentioned resolution, the Assembly also at its ninth session in 1928 prepared a draft of a General Act for the Pacific Settlement of International Disputes in an attempt to unify the numerous existing bilateral arbitration and conciliation treaties by way of a comprehensive multilateral instrument. The draft suggested new concepts for the "permanent or special conciliation commission" (Chapter I: Conciliation) and the "arbitral tribunal" (Chapter III: Arbitration), both of which could be constituted according to the Act.

The draft of the General Act also provided for the judicial settlement of international legal disputes (Chapter II: Judicial Settlement), namely

resort to the Permanent Court. A State might accede to the 1928 General Act by choosing one of three formulae: Formula A (all provisions relating to conciliation, judicial settlement and arbitration); Formula B (conciliation and judicial settlement); Formula C (conciliation only) (General Act of 1928, Art. 38). Judicial settlement was in all cases accompanied by resort to conciliation or arbitration.

Article 17, namely the first Article in Chapter II (Judicial Settlement), of the General Act read:

> "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court . . . unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the [Court's] Statute."

Article 39 (referred to in the above text) applied not only to the chapter on judicial settlement but also to those on conciliation and arbitration, and read "a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph"; those reservations were restricted to three possibilities and did not include anything related to the Commonwealth reservation.

12. It is important to note, however, that in the draft of the General Act judicial settlement (Chapter II) was treated differently from the cases of conciliation and arbitration, in that resort to the existing institution of the Permanent Court itself was not new. This indicates that, as far as resort to the Permanent Court is concerned, the text of the General Act added nothing new to the existing "optional clause" under the Court's Statute. Accession to the General Act under Formula A or B (covering judicial settlement) was not intended to replace acceptance of the "optional clause" or to create any obligation with respect to the Court's jurisdiction. The States parties to the Court's Statute remained free at all times to accept the "optional clause" under the Statute. As far as the compulsory reference of disputes to the Permanent Court is concerned, the General Act did not have any real effect and cannot be considered to impose a new obligation upon those States which acceded to it or to modify the Court's jurisdiction which the States had previously accepted. In other words, the General Act, in its part dealing with judicial settlement (Chapter II), was not intended to replace or be a substitute for Article 36, paragraphs 1 and 2, as a basis for the Court's jurisdiction.

The Assembly, in parallel with the Resolution mentioned in paragraph 9 above, adopted on the same day a resolution urging the Assembly to adopt the General Act.

13. In addition, these provisions regarding judicial settlement show

that the General Act should have been considered in combination with the Assembly's Resolution, mentioned in paragraph 10 above, which was designed as an appeal to States to accept the compulsory jurisdiction of the Permanent Court, even with such reservations attached as the States might deem indispensable. The General Act cannot be considered as inconsistent with the intended effect of the Resolution — adopted in parallel and on the same date as the Act. I would like to repeat what I said in paragraph 7 above in connection with the 1924 Protocol, which is equally relevant to the General Act, and I quote:

> "[T]he drafters of the [1924 Protocol] apparently did not consider that those States unwilling to adhere to the compulsory jurisdiction of the Court by accepting the 'Optional Clause' of the Statute would in any case assume anew the same obligation simply by acceding to the [1924 Protocol]."

14. The General Act of 1928 entered into force on 16 August 1929 after the required number of States (namely, two: Sweden (13 May 1929) and Belgium (18 May 1929)) had acceded to it in 1929. Other States followed suit: 23 States altogether have acceded to the General Act and Latvia's accession on 17 September 1935 was the last of those. (See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999*, New York, United Nations, 2000.)

In fact, all 23 States which, in the period of several years after 1928, acceded to the General Act of 1928 had, prior to that accession, made declarations under the "optional clause". This is shown in the table on page 43, which is based on the best available information. It is also noteworthy that the reservations these States attached to their accession to the General Act were in substance the same as those attached to their respective declarations accepting the Court's jurisdiction under the "optional clause".

15. India, which, as I have explained, had already adopted the "optional clause" on 19 September 1929, acceded to the General Act on 21 May 1931, in parallel with Great Britain and other Commonwealth countries, such as Australia, New Zealand, and Canada (note: Canada's accession occurred on 1 July 1931):

> "Subject to the following conditions:
>
> 1. That the following disputes are excluded from the procedure described in the General Act
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> . . . . . .
>
> (iii) Disputes between the Government of [India] and the Government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such a manner as the parties have agreed or shall agree."

(Note: this reservation was common to all the Commonwealth nations mentioned above.)

State	*Date of Accession to the General Act of 1928*	*Date of Declaration of the Optional Clause*
Sweden	13 May 1929	18 March 1926
Belgium	18 May 1929	25 September 1925
Denmark	14 April 1930	28 January 1921
Norway	11 June 1930	6 September 1921/ 22 September 1926
Netherlands	8 August 1930	6 August 1921/ 22 September 1926
Finland	6 September 1930	3 March 1927
Luxembourg	15 September 1930	1921
Spain	16 September 1930	21 September 1928
Australia	21 May 1931	20 September 1929/ 14 March 1922
France	21 May 1931	19 September 1929
Great Britain	21 May 1931	19 September 1929
India	21 May 1931	19 September 1929
New Zealand	21 May 1931	19 September 1929
Canada	1 July 1931	20 September 1929/ 28 July 1930
Estonia	3 September 1931	25 June 1928
Italy	7 September 1931	9 September 1929
Greece	14 September 1931	12 September 1929
Ireland	26 September 1931	14 September 1929
Peru	21 November 1931	19 September 1929
Turkey	26 June 1934	26 June 1934
Switzerland	7 December 1934	7 December 1934
Ethiopia	15 March 1935	12 July 1926
Latvia	17 September 1935	10 September 1929

(Note: The dates shown in the above table have been taken from the Annual Reports of the Permanent Court of International Justice.)

On the eve of the outbreak of war in Europe, India (along with the United Kingdom and some other Commonwealth nations), by means of a communication received at the Secretariat on 15 February 1939, made a declaration stating that:

> "India will continue, after the 16th August 1939, to participate in the [General Act] subject to the reservation that, as from that date, the participation of India will not . . . cover disputes arising out of events during the war. The participation of India in the General Act, after the 16th August 1939, will continue, as heretofore, to be subject to the reservations set forth in the instrument of accession in respect of India."

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16. The General Act was revised in 1949 to take account of the new United Nations system. Since that time not one single State has acceded to the General Act in its 1949 revised form. On the contrary, some States have denounced the General Act to which they had previously acceded.

After the Second World War, Pakistan declared, in its notification of succession dated 30 May 1974 (see United Nations Treaty Collection Database, update 13 June 2000) to the Secretary-General, that it "continues to be bound by the accession of British India of the General Act of 1928" and that it "does not, however, affirm the reservations made by British India". This is the only positive action taken in the post-war period by any State in connection with the General Act of 1928.

* * *

17. I now conclude this extensive discussion of the 1928 General Act by repeating, as I stated in paragraph 2 above, that I agree that the Court has no jurisdiction to entertain the Application of Pakistan on the basis of the provisions of Article 17 of the General Act but I come to this conclusion for different reasons: namely, *not* because, as the Court maintains, India is presently not a party to the General Act of 1928 as revised in 1949, *but* because the Act itself *cannot* be considered a document that would confer compulsory jurisdiction upon the Court independently from or in addition to the "optional clause" under Article 36, paragraph 2, of the Statute of either the Permanent Court or of the present Court. The Court's jurisdiction is conferred *only* pursuant to Article 36, paragraphs 1 or 2, of its Statute.

(Signed) Shigeru ODA.