DISSENTING OPINION OF JUDGE ALVAREZ

[Translation]

I

Nature of the dispute

The case now before the Court has given rise to long discussions, both in the written proceedings and in the oral arguments. All the legal questions relating to jurisdiction involved in the dispute have not, however, in my opinion, been fully brought out.

There are four important questions which have to be considered by the Court :

(1) What is the scope of the Declaration by which Iran accepted the provisions of Article 36, paragraph 2, of the Statute of the Court, or rather, how is this Declaration to be construed ?

(2) Is the nationalization by Iran of the oil industry, which directly affected the Anglo-Iranian Oil Company, a measure solely within the *reserved domain* of Iran, and thus outside the jurisdiction of the Court ?

(3) What is the nature of the United Kingdom Government's intervention in this case ?

(4) What is the scope of Article 36, paragraph 2, of the Statute of the Court ? Is the Court competent to deal with questions other than those expressly specified in the said article ?

I shall follow the scheme of my previous individual and dissenting opinions, and consider the questions indicated above from the point of view of the law, after which I shall apply the law to the facts of the present dispute.

One preliminary observation of cardinal importance must be made in this connection. As a result of the profound and sudden transformations which have recently occurred in the life of peoples, it is necessary to consider in respect of the above questions, first the way they have been settled until recent times, that is to say, in accordance with *classical international law*, and secondly, how they are settled to-day, that is to say, in accordance with the *new international law*.

There is a fundamental difference between the two. *Classical international law* was *static*, it scarcely altered at all, because the life of peoples was subject to few changes ; moreover, it was based on the *individualistic regime*. The *new international law* is *dynamic ;* it is subject to constant and rapid transformations in accordance with the new conditions of international life which it must ever reflect. This law, therefore, has not the character of quasi-immutability ; it is constantly being created. Moreover, it is based upon the *regime*

of interdependence which has arisen and which has brought into being the *law of social interdependence*, the outcome of the revitalized juridical conscience, which accords an important place to the general interest. This is *social justice*. This law is not, therefore, mere speculation ; nor is it the ideal law of the future, but it is a reality ; it is in conformity with the spirit of the Charter as it appears from the Preamble and from Chapter I thereof.

The Court must not apply *classical international law*, but rather the law which it considers exists at the time the judgment is delivered, having due regard to the modifications it may have undergone following the changes in the life of peoples ; in other words, the Court must apply the *new international law*.

II

Scope of the Declaration by which Iran accepted the provisions of Article 36, paragraph 2, of the Statute of the Court

It was this question which gave rise to the most lengthy argument. The Parties resorted to arguments of all kinds, especially to arguments based on the rules of grammar. The question whether Iran's Declaration of adherence was unilateral or bilateral in character was also argued. I shall not dwell long upon this latter point ; the Declaration is a multilateral act of a special character ; it is the basis of a treaty made by Iran with the States which had already adhered and with those which would subsequently adhere to the provisions of Article 36, paragraph 2, of the Statute of the Court.

The Iranian Declaration of adherence should not be construed by the methods hitherto employed for the interpretation of unilateral instruments, conventions and legal texts, but by methods more in accordance with the new conditions of international life.

The traditional methods of interpretation may be summarized by the following points :

(1) It is considered that the texts have an everlasting and fixed character as long as they have not been expressly abrogated.

(2) Strict respect for the letter of the legal or conventional texts.

(3) Examination of these texts, considered by themselves without regard to their relations with the institution or convention as a whole.

(4) Recourse to *travaux préparatoires* in case of doubt as to the scope of these texts.

(5) Use, in reasoning, of out-and-out logic, almost as in the case of problems of mathematics or philosophy.

(6) Application of legal concepts or doctrines of the law of nations as traditionally conceived.

(7) Application of the decisions of the present International Court, or of the earlier Court, in similar cases which arise, without regard to the question whether the law so laid down must be modified by reason of the new conditions of international life.

(8) Disregard for the social or international consequences which may result from the construction applied.

Some form of reaction is necessary against these postulates because they have had their day.

In the first place the legal or conventional texts must be modified and even regarded as abrogated if the new conditions of international life or of States which participated in the establishment of those texts, have undergone profound change.

Then it is necessary to avoid slavish adherence to the literal meaning of legal or conventional texts ; those who drafted them did not do so with a grammar and a dictionary in front of them ; very often, they used vague or inadequate expressions. The important point is, therefore, to have regard above all to the *spirit* of such documents, to the intention of the parties in the case of a treaty, as they emerge from the institution or convention as a whole, and indeed from the new requirements of international life.

Recourse should only be had to *travaux préparatoires* when it is necessary to discover the will of the parties with regard to matters which affect their interests alone. A legal institution, a convention, once established, acquires a life of its own and evolves not in accordance with the ideas or the will of those who drafted its provisions, but in accordance with the changing conditions of the life of peoples.

A single example will suffice to show the correctness of this assertion. Let us assume that in a commercial convention there is a stipulation that all questions relating to maritime trade are to be governed by the principles of international law in force. These principles may have been followed by the parties for a century, perhaps, without any disputes arising between them ; but one of the parties may, at the present time, by reason of the changes which have recently taken place in such matters, come to Court to claim that the century-old practice hitherto followed should be changed on the ground that it must be held that the will of the parties is no longer the same as it was at the time when the convention was signed. This is in many ways similar to the *rebus sic stantibus* clause which is so well known in the law of nations.

It is, moreover, to be observed that out-and-out reliance upon the rules of logic is not the best method of interpretation of legal or conventional texts, for international life is not based on logic ; States follow, above all, their own interests and feelings in their relations with one another. Reason, pushed to extremes, may easily result in absurdity.

It is also necessary to bear in mind the fact that certain fundamental legal conceptions have changed and that certain institutions and certain problems are not everywhere understood in the same way : democracy is differently understood in Europe and in America, and in the countries of the Eastern group and those of the Western group in Europe ; the institution of asylum is not understood in the same way and is not governed by the same rules in Europe and in Latin America ; the Polar question, particularly in the Antarctic, is not looked at in the same way in America as on other continents, and so forth.

Finally, it is necessary to take into consideration the consequences of the interpretation decided upon in order to avoid anomalies.

Applying the foregoing considerations to the determination of the scope of Iran's adherence to the provisions of Article 36, paragraph 2, of the Statute of the Court, this adherence must be interpreted as giving the Court jurisdiction to deal with the present case. The scope of this adherence is not to be restricted by giving too great an importance to certain grammatical or secondary considerations. Justice must not be based upon *subtleties* but upon *realities*.

I shall not dwell on this point, because I think it is necessary to consider other elements, perhaps more important than the will of the Parties, in order to decide as to the Court's jurisdiction, as will subsequently be seen.

III

Iran's nationalization of the oil industry and the "reserved domain" of that State

The Iranian Government, in its "Observations préliminaires", filed on February 4th, 1952, expressly asserted that the nationalization of the oil industry which it had put into effect was a measure exclusively within its *reserved domain* and that the Court therefore had no jurisdiction to deal with this case.

It is necessary in the first place briefly to examine the nature of the *reserved domain*, its origin and its present state.

This domain was established by classical international law as a natural consequence of the *individualistic regime* and of the absolute sovereignty of States upon which this law was founded.

This reserved domain covered a very wide field. In particular, States could, without regard to the will or the interests of other States, do the following :

(a) Every State could set up the internal political organization which it considered the most suitable without being accountable to anybody.

(b) It could enact such laws as it considered necessary, even if these were contrary to international law, and its courts were required to apply only these laws.

(c) It could freely determine who were its nationals.

(d) It could, in entire freedom, determine the civil rights of its nationals and those of foreigners residing on its territory, often differentiating in important respects between these two categories.

(e) Foreigners were in all respects subject to the authority of the State in which they resided and had no redress even if they were prejudiced as the result of the action of that State.

(f) Each State could, by virtue of what was called its *domaine éminent*, make such use as it desired of the natural resources of its territory, which might or might not be the subject of exploitation concessions to private persons and which might be reclaimed by the State if it so desired.

(g) It could freely exercise its sovereign rights over the whole extent of its territory, free from any obligation towards other States or towards the international community. It could, in particular, take or refrain from taking the measures necessary to ensure internal order, carry out surveillance of its coasts, facilitate navigation, etc.

(h) Each State could, as it pleased, conclude treaties with other States without any means existing for their modification or abrogation.

From the middle of the 19th century, as the result of the appearance of important factors which had not previously existed, the traditional *individualistic* regime of the absolute sovereignty of States began to give place to a new regime, that of *interdependence*, which gave rise, as I have said, to the *law of social interdependence*. This resulted in the beginning of the total or partial internationalization of all the matters referred to above as within the reserved domain. It is now admitted that a State which, in the exercise of its sovereignty, causes damage to another State, must indemnify that other State. Moreover, the concept of *abus du droit*, of which I shall have more to say later, is beginning to be introduced into international law. As a result of these various factors, the reserved domain of States has been modified and considerably reduced ; in many cases it is possible to present a claim against a State relating to matters which it alleges to be within its reserved domain.

I shall merely give one example : although it is true that every State may establish the internal organization which it chooses, this organization must nevertheless be such that the State can fulfil its international obligations ; if the State does not do so, it cannot be admitted as a Member of the United Nations or it may be expelled

from the United Nations (Articles 4 and 6 of the Charter) and, in any event, if by reason of defects in its internal organization it causes injury to another State, it is under an obligation to compensate that State.

IV

Nature of the intervention by the United Kingdom Government in the present case.

This point is of cardinal importance.

The United Kingdom Government applied to the Court on May 26th, 1951, in order to protect the interests of the Anglo-Iranian Oil Company, an English company, on the ground that Iran, by nationalizing the oil industry, had violated the rights of that Company, rights derived, in particular, from the Concession Agreement of 1933 concluded between the Company and Iran.

The United Kingdom Government is therefore not appearing in this case in defence of its *own* interests, but to *protect* the interests of its nationals, which is a very different matter.

In accordance with the international law in force, a State may formulate a claim against another State in three cases :

(a) When one of its rights has been violated by that State.

(b) To protect the rights of its nationals if these rights have been disregarded or violated by that State.

(c) To defend the rights of a State which has entrusted it with this defence because it cannot directly undertake its own defence, for instance, if it has broken off diplomatic relations with the State which has violated its rights.

The position of the claimant State is quite different in each of the three cases.

In the first case, that is to say, where the State is acting in defence of its own interests, attention must be confined to the agreements which have been concluded between the two States.

In the second case, the claimant State acts in virtue of a right conferred by the law of nations and universally recognized in practice, the right of diplomatic protection of its nationals. In accordance with this law, the action of the claimant State cannot be met by any of the arguments that could be raised against it if it were acting on its own behalf : the only objections which can be raised to such a claim are those which are based upon international law or which result from the nature of the right which the claimant relies on.

No difficulty arises in respect of the third case. The State against which the claim is made can, as against a State acting on behalf of the claimant State, rely only upon conventions or agreements concluded between the last-named State and itself.

It must be pointed out as regards diplomatic protection that, according to the new international law, it may assume three different

forms which depend upon the organ before which that protection is exercised : *(a)* direct protection or claim against a State ; *(b)* protection before the Security Council of the United Nations ; *(c)* protection before the International Court of Justice.

These three aspects of diplomatic protection will disappear or will undergo changes when the new international law clearly establishes the international rights of the individual, i.e. those rights which he will be entitled to invoke directly against a State without resorting to the diplomatic protection of the country of which he is a national.

V

What is the scope of Article 36, paragraph 2, of the Statute of the Court ? Is the Court competent to deal with matters other than those specifically indicated in that Article ?

These questions, in my opinion, constitute the crucial point of the present case.

The arguments which we have heard proceeded from the basis, which was regarded as indisputable, that the Court's jurisdiction is determined solely by Article 36, paragraphs 1 and 2, of its Statute and that it is consequently derived almost entirely from the consent of the Parties. This explains the long arguments as to the scope of Iran's adherence to the provisions of that Article.

This view is incorrect.

It should be pointed out, in the first place, that Articles 36 and 38 of the Statute of the Court, in Chapter II relating to the competence of the Court, are very defective. Article 38, which reproduces Article 38 of the Statute of the Permanent Court of International Justice, has long been the subject of strong criticism, of which no account was taken at the San Francisco Conference when that Article was revised. It is therefore for the International Court of Justice to determine its true scope. The same must be said of Article 36.

That article, Article 36, refers to disputes which may arise between States ; these relate to rights flowing from agreements concluded between these States or from rules established by international law with regard to given questions (land domain, maritime domain, etc.). What are involved therefore are disputes ordinarily relating to instruments to which two or more States are parties.

But in addition to such rights there are others, directly established by international law, which have not been sufficiently brought out in the present case to determine the Court's jurisdiction. These rights do not result from the will of States or from other juridical acts, but from the revitalized conscience of the people which takes account of the general interest. These rights do not create

direct obligations between States; their existence may not give rise to discussion but must be protected in the event of their violation.

Among these rights, it is necessary to mention in particular those which are said to be fundamental rights of States (the right to independence, to sovereignty, to equality, etc.), as well as certain other rights conferred by the law of nations, such as that of the protection of nationals, the right to be indemnified for injuries, and so forth.

Article 36 of the Statute of the Court does not refer to the rights falling within this second category, for they do not give rise to disputes and, perhaps for this reason, no thought was given to them. But Article 36 does not exclude them from the Court's jurisdiction; if this had been the intention, it would have been stated expressly.

How then is this gap to be filled, or in short, how is the Court's jurisdiction with regard to this second category of rights to be determined? In order to do this, it is necessary to have recourse to the *spirit* of the Charter of the United Nations, of which the Statute of the Court forms an integral part (Article 92 of the Charter), and to the general principles of the law of nations. It is moreover necessary to have regard to the international consequences which might result from a restrictive interpretation of Article 36.

The Charter seeks to add to the prestige of the law of nations, as appears from the Preamble, paragraph 3, from Article 1, paragraph 1, of Chapter I, from Article 2, paragraph 3, as well as from Article 13 *(a)* and from Articles 36 and 38. International law and the International Court of Justice are, at the present time, closely linked together: it is impossible to conceive of an international Court which does not apply the law of nations, or of this law without a Court to apply it.

In accordance with the spirit of the Charter, and with the general principles of international law, all the rights of States must be fully recognized and protected and the conflicts to which they may give rise must be settled by peaceful means.

There is a fundamental difference between classical international law and the new international law with regard to the means available to States to assert the two categories of rights indicated above.

Under *classical international law*, disputes between States arising from conventions or facts giving rise to legal relations, or from rules established by the law of nations on given matters, had to be settled by means freely chosen by the parties; but if the parties could not agree as to these means, the dispute remained unresolved and consequently the stronger State could to some extent impose its will upon the weaker.

The same is true with regard to the *exercise* of a right expressly recognized by the law of nations, that is to say those rights which fall within the second category referred to above. Here again, if some peaceful settlement is not reached, a strong State can impose its will upon a weak State ; and if the latter be the claimant, its right remains of no practical value.

In the *new international law* the matter is wholly different. In accordance with this law, and in particular with the spirit of the Charter, all disputes between States must be resolved by peaceful means, and all the rights recognized by the law of nations must be respected and must have a sanction.

To this end, the Charter created an international organization comprising, among other organs, the Security Council and the International Court of Justice.

If the Statute of the Court were intended to limit the powers of the Court solely to the solution of disputes relating to rights of the first category referred to above, it would, as I have said, have expressly so provided. The Court then would be, in effect, a mere international court of *arbitration*. It would have been better, in these circumstances, to have confirmed the Permanent Court of Arbitration set up in 1899, which has the advantage of being composed of judges selected in each case by the parties themselves. But the present Court is, according to its Statute, a Court of *justice* and, as such, and by virtue of the dynamism of international life, it has a double task : to *declare* the law and *develop* the law. Its first task includes the *settlement of disputes* between States as well as the *protection of the rights* of those States as recognized by the law of nations. As regards the Court's second task, namely, the development of law, it consists of deciding the existing law, modifying it and even creating new precepts, should this be necessary. This second mission is justified by the great dynamism of international life. The Third Session of the General Assembly of the United Nations has recognized the Court's rights to develop international law in its Resolution No. 171. The Institute of International Law has on its side in the recently held Session at Siena expressly recognized this right of the Court. In creating a commission, the Institute unanimously adopted the following Resolution : *[Translation]* "The Institute of International Law, keenly aware of the growing importance of the International Court of Justice and of its rôle in the development of international law...." In discharging this task the Court must not proceed in an arbitrary manner, but must seek inspiration in the great principles of the new international law.

With regard to the protection of these rights, it is unnecessary to ascertain whether the complainant or the State against which the claim is made has or has not accepted the jurisdiction of the Court, or whether it is or is not a Member of the United Nations. Every State in the world is to-day a member of the international

community, or rather, of the international society ; all are subject to the law of nations and have the rights and obligations laid down by that law. It is impossible to suppose that a State not a Member of the United Nations, or one which has not accepted the jurisdiction of the Court, should be able to violate the rights of other States and that it should not be possible to bring it before the Court ; or, conversely, that a State which is a Member of the United Nations should be able so to act with regard to a non-member State.

The Court, in its Advisory Opinion of April 11th, 1949, on "Reparations for Injuries suffered in the Service of the United Nations" expressly adopted the above-mentioned point of view. It held that "in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which *is not a member*, the United Nations, as an Organization, has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the United Nations".

It must be noted that in that Opinion, the Court actually *created* the law.

The State responsible may therefore be brought before the Court without its being necessary to inquire whether it has or has not accepted the jurisdiction of the Court or whether it has adhered to the provisions of Article 36 (2) of its Statute.

If the United Nations brought before the Court a claim against a State on the grounds above referred to, could it be possible for the Court to reject the claim brought by this Organization, on the basis of Article 34 (1) of the Statute, which provides that : "only States may be parties in cases before the Court", and on the ground that the United Nations are not a State ? This would be nonsense.

It should be pointed out too, with regard to rights of the second category above referred to, that the new international law has reinforced and amplified the rights which already existed and it has recognized or conferred others which are of great importance and which have no existence in classical international law. I shall mention but three, because they are closely linked with the substance of the present dispute : that of the *protection of nationals*, which is reinforced, that resulting from a *denial of justice* and that resulting from an *abus du droit*. This last concept, which is relatively new in municipal law (it finds a place in the Civil Codes of Germany and Switzerland) is finding its way into international law and the Court will have to give it formal recognition at the appropriate time.

Efforts are moreover being made at the present time to establish a universal declaration of the rights of the individual, and in order to give these rights protection on an international level, it is sought to create a special Court. It is clear that it will be enough for the

State concerned to present itself before that Court or, failing that, before the International Court of Justice for it to obtain satisfaction.

Lastly, if the Court should hold that it lacks jurisdiction whenever rights of the second category of which I have spoken are concerned, very important cases might occur in which such a holding of lack of jurisdiction would cause disappointment and would considerably damage the prestige of this tribunal.

In conclusion, the Court should interpret and even develop Article 36 of its Statute in the sense indicated above.

In conclusion, I shall merely indicate briefly certain other observations with regard to the jurisdiction of the Court for the purpose of completing what may be called a *general theory* of the Court's competence.

(1) The Court is competent to give an opinion on all questions submitted to it by the Security Council or the Assembly of the United Nations. Its jurisdiction results from the fact that the Court is one of the organs of the United Nations (Article 7 of the Charter).

(2) Many international relations have at the present time a political as well as a juridical aspect ; this was recognized by the Court in its Advisory Opinion of May 28th, 1948. In such cases, the Court must consider both these aspects of cases submitted to it.

(3) It may happen that a dispute has entirely separate juridical and political aspects. In such a case, the Court is competent to deal with the juridical aspect and the Security Council is competent to deal with the political aspect.

(4) If a case submitted to the Court should constitute a threat to world peace, the Security Council may seise itself of the case and put an end to the Court's jurisdiction. The competence of the Council results from the nature of the international organization established by the Charter, and from the powers of the Council.

VI

Conclusions

The following conclusions result from the legal considerations which I have set out, in the case now before the Court :

(1) The Court has jurisdiction to deal with the claim presented against Iran by the United Kingdom by reason of the Iranian Declaration of adherence to the provisions of Article 36, paragraph 2, of the Statute of the Court.

(2) The Court has jurisdiction, in particular, because the United Kingdom is not acting in the present case in defence of its own interests, but to protect the interests of one of its nationals, the Anglo-Iranian Oil Company.

Since the United Kingdom is exercising this right of protection, it cannot be met with arguments as to the scope of the Iranian Declaration of adherence to the provisions of Article 36, paragraph 2, of the Statute of the Court, because what is involved is not a dispute between these two countries, but the exercise of a right recognized by the law of nations.

(3) In view of the nature of the reserved domain at the present day, the Court's jurisdiction cannot be limited by the Iranian contentions with regard to this domain.

(4) The Court has a very wide jurisdiction for the protection of rights directly conferred upon States by international law (those relating to the protection of nationals, to reparation for injury unjustly suffered, to denials of justice, to *abus du droit*, etc.). Its jurisdiction in this connection cannot be limited by the non-adherence of the State against whom the claim is made to the provisions of Article 36, paragraph 2, of the Statute of the Court.

The exercise of some of these rights may constitute the merits of the dispute between the United Kingdom and Iran.

(Signed) A. ALVAREZ.