DISSENTING OPINION OF JUDGE GUERRERO

[Translation]

I regret to find myself in disagreement with the operative part of the Judgment and with a few of the considerations on which it is founded.

On the other hand, I share the view of the Court when it recognizes that, in the present case, the jurisdiction of the Court depends upon the Declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute.

This view does not seem to me to conflict with the principle that the problem of the Court's jurisdiction is reduced to determining the extent of the obligations assumed by the Parties and to verifying their conformity with the provisions of the Statute which the Court is obliged to observe and respect for which it must ensure.

The consideration of the Court is therefore directed to the instrument by virtue of which it is seised, that is to say, the special agreement or the jurisdictional clause.

In the jurisprudence of the Court, there are to be found very definite indications for the signatories of these instruments. I shall mention only the Order of the Permanent Court of International Justice made on August 19th, 1929, in the case of the Free Zones of Upper Savoy and the district of Gex.

The representatives of France and Switzerland, Parties to this dispute, were in agreement on communication by the Court unofficially to the Agents of both Parties of any indications which might appear desirable as to the result of the Court's deliberation.

After stating in the Order that the spirit and letter of its Statute did not allow the Court to act in accordance with the agreement between the Parties and that the Court could not, on the proposal of the Parties, depart from the terms of the Statute, the Order of August 19th, 1929, stated:

> "Nevertheless, it is important to set forth clearly that special agreements whereby international disputes are submitted to the Court should henceforth be formulated with due regard to the forms in which the Court is to express its opinion according to the precise terms of the constitutional provisions governing its activity, in order that the Court may be able to deal with such disputes in the ordinary course and without resorting, as in the present case, to a construction which must be regarded as strictly exceptional." (Order of August 19th, 1929. Case of the Free Zones, p. 13, Series A, No. 22.)

What is said with regard to special agreements applies equally to the conditions in which States formulate their jurisdictional clauses. In the latter, as in the former, the *consensus* of the Parties

is not sufficient to establish the jurisdiction of the Court. It is further necessary to ascertain whether that *consensus* is compatible with the provisions of the Statute and whether it can be applied without the Court's being obliged to depart from those provisions.

It should be pointed out that, in the case of the Free Zones, the Court decided *ex officio* on the incompatibility of the Franco-Swiss Agreement with the provisions of the Statute of the Court. It did not wait for the question of incompatibility to be raised by the Parties.

It is highly probable that it would have been the same in the present case if the Court had not considered that it should not "examine whether the French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute".

One of the aspects of the problem raised by the second part of the first Objection put forward by the Norwegian Government was the question whether that Government is entitled to rely on the restrictions placed by France on the obligation assumed on March 1st, 1949, and whether Norway, equally with France, was entitled to except from compulsory jurisdiction disputes understood by Norway to be essentially within its national jurisdiction.

This aspect of the problem was examined in to-day's Judgment.

I shall endeavour to consider briefly the other aspect of the problem which the Court did not think it necessary to examine, namely, that of the compatibility of the French reservation with the provisions of the Statute of the Court.

The French Government's Declaration accepting the compulsory jurisdiction of the Court contains the following reservation:

> "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."

The great defect of this reservation is that it does not conform either to the spirit of the Statute of the Court or to the provisions of paragraphs 2 and 6 of Article 36.

It is obvious that the purpose of paragraph 2 is to establish the compulsory jurisdiction of the Court between States which accede to the optional clause. By the fact that France reserves her right to determine herself the limit between her own national jurisdiction and the jurisdiction of the Court, France renders void her main undertaking, for the latter ceases to be compulsory if it is France and not the Court that holds the power to determine the limit between their respective jurisdictions.

The reservation conflicts also with paragraph 6 of Article 36, which is in the following terms:

"In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

This principle is common to all arbitral and judicial tribunals of an international character.

The Court would perhaps be the only tribunal that would be compelled to refuse to deal with a dispute submitted to it whenever a State invoked the reservation in question to claim the right to determine that limit.

Without going in detail into the questions raised by the French reservation, I wish, nevertheless, to point out that it is an obstacle to the exercise of the judicial function attributed to the Court and that it seriously affects the efficacity of the optional clause.

These considerations are, in my view, sufficient to prove the urgent necessity for a judicial decision on the validity of reservations which go beyond what is permitted by Article 36 of the Statute.

Although Article 36 has been construed as meaning that a declaration of accession to the optional clause may contain reservations, it is certain that it was never the intention of the authors of the Statute that such reservations should serve to enable a State to evade the undertakings involved in the declaration provided for by Article 36, paragraph 2, or unilaterally to arrogate to itself rights which the Statute confers solely on the Court.

Such reservations must be regarded as devoid of all legal validity. It has rightly been said already that it is not possible to establish a system of law if each State reserves to itself the power to decide itself what the law is.

It is clear, moreover, that the new practices introduced in August 1946 are contrary to the spirit and to the purpose of the Statute of the Court and the Charter of the United Nations [1].

The problem to be solved is, however, a simple one. It is, in fact, the problem whether the unilateral will of one State or the common will of the Parties before the Court can have priority over the collective will expressed in an instrument as important as the Statute of the Court.

It may not be inappropriate to recall that when Article 36 of the Statute was construed as meaning that it gave the right to accede to the optional clause with reservations, this was under the favourable influence of the attitude which the Members of the League of Nations had adopted in regard to the jurisdiction of the Court. Their declarations of acceptance were accompanied only by reservations that came within the framework of Article 36 of the Statute. The anxiety of the Members of the League of Nations was that the

[1] *American Bar Association Journal*, March 1947, No. 3, p. 249, and May 1947, No. 5, p. 432.

movement towards the final establishment of international compulsory jurisdiction, which was developing so well before the Second World War, should not be impeded in any way whatsoever.

It was only in the early days of the United Nations that the situation changed completely, when one of its Members declared, on August 14th, 1946, that it accepted the compulsory jurisdiction of the Court, provided that its Declaration should not apply, *inter alia*, to disputes with regard to matters which are essentially within its own domestic jurisdiction, as determined by itself.

Six other States have up to the present followed the example set on August 14th, 1946. Should this practice gain other followers, the optional clause will cease to be an instrument capable of bringing about compulsory jurisdiction between States.

The validity of these new reservations has, of course, not yet been examined by any international organ of the United Nations. There is, in fact, no other procedure to be followed in regard to declarations of accession to paragraph 2 of Article 36 than that which is provided for in paragraph 4 of the same Article. The Declarations are deposited with the Secretary-General of the United Nations, who transmits copies of them to the Parties to the Statute and to the Registrar of the Court.

What it will be found difficult to understand is what reason the Court could have had for not dealing with the question when it was seised of the Franco-Norwegian dispute, in the course of which the Parties invoked the terms of their respective declarations of accession to the optional clause.

* * *

As regards the operative part of the Judgment, I shall confine myself to saying that I cannot agree that the Court is without jurisdiction when its lack of jurisdiction is founded on the terms of a unilateral instrument which I consider to be contrary to the spirit and to the letter of the Statute and which, in my view, is, for that reason, null and void.

(Signed) J. G. GUERRERO.