DISSENTING OPINION OF VICE-PRESIDENT BADAWI

[Translation]

I am in agreement with the decisions of the Court on Objections 1, 3, 4 and 5, without, however, subscribing to certain aspects of the reasoning for those decisions.

I regret, however, that I cannot concur in the decisions relating to Objections 2 and 6, which I consider well-founded. Each of these Objections would be sufficient in itself to exclude the jurisdiction of the Court to deal with the dispute relating to right of passage.

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The Second Objection relates to the premature filing of the Portuguese Application of December 22nd, 1955.

The Portuguese Declaration was deposited with the Secretary-General on December 19th, but the Full Powers of the representative of that State were signed at Lisbon only on the 20th and were transmitted to the Secretary-General only on the 21st.

Therefore, although the Declaration was submitted on December 19th, it was properly deposited only on the 21st.

But the Application to the Court was filed on December 22nd. The Government of India, as a result of its own investigations, was able to discover the existence of the Declaration towards the end of December, but the Secretary-General did not transmit it to the States until January 1956 (the 19th).

India bases its Objection on the lack of equality, mutuality and reciprocity, but these bases are for India but the consequences of the consensual character of the Declarations. In my opinion, these consequences do not furnish any additional force to the argument based on that consensual character. I shall, therefore, confine myself to this consensual character, the basis of this Objection.

It is generally recognized that a State can be brought before an international tribunal only with its consent. The system of Declarations, however ingenious it may be as a means of overcoming certain hesitations and of finding a practical and variable formula for the acceptance of the jurisdiction of the Court without a rule which is directly and uniformly binding, is none the less based on the idea of consent.

When Article 36 of the Statute uses the words "*ipso facto* and without *special* agreement", it stresses the conventional character of Declarations and it confirms that character by the expression "in relation to any other State accepting the same obligation". These words make it quite impossible to attribute to a Declaration by itself a unilateral character and a binding effect on this ground.

It has been said that the Court has, in certain passages in its decisions, described Declarations as unilateral acts, but an examination of these passages shows that this description in no way signifies that a Declaration by itself and of its own force binds other States. The Court was simply indicating that for the purpose of interpreting such Declarations their unilateral origin should be taken into consideration.

Portugal, moreover, does not contest the consensual character of the legal relationship which is formed between States which have subscribed to Declarations accepting the compulsory jurisdiction of the Court. But it has argued that what creates the consensual bond between these States is the coinciding of their Declarations, or, more accurately, the provision of Article 36, paragraph 2, which establishes a reciprocity of rights and obligations as between the States accepting the same obligation. But that reciprocity cannot create the agreement. It may define its extent. But what creates the agreement here, as in every other meeting of wills, is always the basic idea of offer and acceptance.

Indeed, any Declaration can be analysed only into an acceptance, by the State depositing it, of the Declarations of those States which have preceded it and into an offer by it to them. This analysis is particularly evident when the new Declaration contains new reservations.

But whichever, in this analysis, is the State which offers and that which accepts, it is essential in each case that the offer should be accepted by the State to which it is addressed. This acceptance, even though it be regarded as delimited by reciprocity, is none the less indispensable. It must exist, for it is the basis of the resulting obligation upon these States to submit to the jurisdiction of the Court. It matters little whether the acceptance be actual or constructive, on the basis of a legal interpretation that communication is equivalent to acceptance, it must always be recognized as the only foundation for the jurisdiction of the Court.

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It goes without saying that the Secretary-General is not the ultimate recipient of the Declaration, which is deemed to be addressed or notified by the State making it to the other States which have already accepted the compulsory jurisdiction, so that a binding contract may be formed between them.

The notification of Declarations to the Secretary-General, or their deposit with him and his obligation to communicate them to other States, are merely intended to take the place of direct communications. The Secretary-General is thus a mere depository entrusted with the duty of bringing the Declarations to the knowledge of the other States. By channelling these communications through the office of the Secretary-General, the Statute

was simply seeking to ensure communication in an efficient and regular way. This communication constitutes a special obligation of the Secretary-General which is provided for by Article 36 of the Statute.

Translated into legal terminology, the system of Declarations constitutes a contract by correspondence between the declarant State and the other States through the agency of the Secretary-General as an intermediary who, in these cases, constitutes a stage in the transmission. Counsel for Portugal indeed recognized the correctness of this legal construction, but he contended that the contract was formed by the mere deposit with the Secretary-General.

It is necessary in this connection to recall that every Declaration is itself an acceptance and an offer. The offer by Portugal, contained in its Declaration and addressed to the other States, had not been accepted by India or, indeed, communicated to India.

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With regard to the formation of contracts by correspondence, municipal legal systems adopt different positions. Some adopt the declaration theory; others the dispatch theory. Still others take the view that the contract is concluded at the time and place where the author of the offer becomes aware of its acceptance, and there is the further view, which is that of the French *Cour de Cassation*, that it is a question of fact which has to be decided in the light of the circumstances of each case.

Portugal contends that Article 36 of the Statute is silent on this point but, being obliged to recognize the consensual character of Declarations as a tacit implication of the system, it seeks to explain the expression of consent as between States by the mere coinciding of their Declarations. But, in fact, this coincidence is often lacking and, in any event, it constitutes only the measure and the extent of the respective obligations of the States.

It is true that the point is a new one and one for which there is no precedent. Generally speaking, the point has not been dealt with either in the writings of publicists or in judicial decisions. The present case reveals the desire that was felt to spring a surprise and thus to avoid the possibility of abrogation of or exclusion from a Declaration. But it fails wholly to satisfy the minimum conditions required for the formation of a contract.

Since the Declaration was deposited with the Secretary-General on the eve of the Application, it would have been impossible to suppose that it would be transmitted to the other States within 24 hours. The position therefore is the same as if the Declaration had not been made.

It is unnecessary and would indeed be useless to discuss the question of the moment at which consent may be said to exist, at which a contract may be regarded as having been formed between

the declarant State and the other States. Whatever that moment may be, the position in the present case is that, in any event, and whatever criterion or moment may be adopted with regard to the formation of a contract by correspondence, it was prior to that moment. The present case is similar to one in which there is an offer which has not yet been dispatched.

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In relying upon Article 36, paragraph 2, of the Statute to say that a Declaration produces its effects immediately and makes it permissible to seise the Court the day after it is deposited, the Court puts the emphasis on the expression *"ipso facto"*, *"de plein droit"*, but by isolating that expression from the following expression "and without special agreement", which completes it, the complete idea contained in the Statute has been dismembered and disregarded. What the Statute sought to provide was that there should be no need, for the acceptance of the jurisdiction of the Court, of a *special* agreement (I stress the word "special") between each State and the other States. However, since submission to an international tribunal is essentially and pre-eminently conventional in character, such submission, in accordance with the Statute, is to result *ipso facto* from the convention which comes into being between the declarant State and the other States by the exchange of Declarations between them—an exchange the operation of which is ensured by the Statute through a dual obligation: that of the declaring State to deposit it with the Secretary-General and that of the latter to communicate it to the other States. The notion of a convention has thus been strictly observed both in substance and in form in the Optional Clause system.

But would it have been possible to preserve this idea without the operation of the classical notion of offer and acceptance? It is obvious that the authors of the Statute could not have brought about innovations in legal concepts. But apart from this classical mechanism, there remains only the theory of the declaration of the will and that of the contract by accession in which the dual elements of offer and acceptance become merged. Very few legal systems, however, recognize the first theory, whereas the second has no points of analogy with the Optional Clause.

Indeed, whereas the essential feature of the "adherence" or "accession" contract is uniformity, that of Declarations is variety and diversity. Each Declaration expresses the conditions, the purposes and the policy of the State which makes it. Furthermore, in "adherence contracts" one of the parties in fact is in a position in which it is impossible to discuss the terms of the contract. It is obliged to contract and gives its adherence to the all powerful will of the other. In this category are included, *inter alia*, contracts of

service, contracts for transport and for insurance. What analogy can there be between such contracts and Declarations accepting jurisdiction?

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Reference has also been made to the case of collective or multilateral conventions in which a State, by acceding thereto, assumes by its mere act of accession the capacity of a party to the convention, benefiting from the rights conferred by the convention and subject to the obligations which it prescribes independently of acceptance by other States. But the position in this case is no different from that referred to in "adherence contracts" under municipal legal systems, since the convention is accepted as a whole—as it stands —and since indeed it remains open to accessions by the will of its signatories.

Reliance has, however, been placed upon the Opinion of the Court of May 28th, 1951, on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. But, in the first place, this Opinion does not deal with the rule relating to adherence to collective conventions; furthermore, the Opinion recognizes that a given reservation is valid only if it is accepted by every one of the contracting parties and that this conception, directly inspired by the idea of contract, constitutes an undeniable principle. Moreover, the Opinion given by the Court was expressly limited to the Genocide Convention itself.

Furthermore, the Optional Clause system established by Article 36 of the Statute has nothing in common with a collective convention. It is concerned with individual Declarations, varying considerably in character, which, combined together by means of their mutual exchange, constitute conventions which are equally variable and limited by reciprocity.

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Reference has been made to the practice of States which denounce and renew their Declarations in the belief that both their denunciation and their renewal take immediate effect, and, in particular, the contrast has been pointed out between the attitude and the contentions of India with regard to the premature character of the Application and the formula adopted by that State with reference to its denunciation of January 7th, 1957, of its own Declaration, a denunciation which was to take immediate effect; and it has been argued that what applies to the denunciation of the Indian Declaration should likewise apply to the Portuguese Declaration.

But it is more than doubtful, in my opinion, whether the word "immediate" can have the effect of eliminating the consensual

notion in respect of the denunciation of the contract by which the jurisdiction of the Court is accepted.

In the case both of the formation of this contract and of its denunciation, the same rules relating to the necessity for acceptance should be applied.

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I therefore consider that the juridical construction which both takes into account the factual elements of the dispute submitted to the Court and is in conformity with the Statute, does not make it possible to say that any agreement existed between Portugal and India with regard to acceptance of the jurisdiction of the Court. It would follow that the Court is without jurisdiction to deal with the Application of December 22nd, 1955, on the basis of the Second Objection.

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The Sixth Objection is based upon the provision relating to disputes arising after February 5th, 1930, with regard to situations or facts subsequent to that date; it is an objection *ratione temporis*.

I shall disregard the first phase in which this Objection bore a certain relationship of dependence with the Fifth Objection and in which the scope of the Objection was vague, imprecise and hypothetical, and I shall confine myself to the final form of the Objection, the form in which it was put forward in the oral reply. In this phase, as in the earlier ones, both Parties relied upon the Judgments in the *Phosphates* case and in the *Electricity Company of Sofia* case, and each relied upon the words used by the Permanent Court in the two decisions regarding the situation which it described as *the source of the dispute*.

In both the *Phosphates* case and the *Electricity Company of Sofia* case, there was a clear distinction between the dispute and the situation. In the *Phosphates* case, both the dispute and the situation which gave rise to it were, in the view of Italy, unlawful acts. But the Court traced back the situation, which gave rise to the conflict, to 1920, the date of the dahir establishing the phosphate monopoly, and it held itself without jurisdiction because that date was prior to the date of the ratification of the Declaration.

In the *Electricity Company of Sofia* case, the Bulgarian Government sought to trace back the dispute to an earlier date, namely, that of the arbitral awards made prior to the Declaration, in which case the Court would have been without jurisdiction; but the Court found that the awards had been recognized by both parties as being binding and that the question of their application after the date of the Declaration was the source of the disputes.

In the present case, in spite of the fact that India claims that the dispute was prior to 1930, its real date is 1954. This is the date contended for by Portugal and it was at the end of July of that year that it became crystallized.

But what is the fact or the situation which can be regarded as the source of the dispute? Portugal, in the last phase of the oral arguments, expressed the view that "They are those *which were constituted by* the interruption of communications with the enclaves, brought about by the act of the Indian Union in 1954, and by the continuance of that state of affairs. At a given moment India decided to prevent access by Portugal to its enclaves and put that decision into effect" (p. 236 of the Oral Proceedings volume).

In an earlier phase, Portugal stated: "It is well known how this dispute came into existence. In its Notes of February 27th, 1950, and of January 14th and May 1st, 1953, the Indian Union manifested its claim to put an end to the sovereignty of Portugal over its territories in the Hindustan Peninsula by absorbing these territories. These Notes—as stated in paragraph 30 of the Memorial —constitute the 'prelude to the events which are the basis of the present action'." (Same volume, p. 117.)

According to this argument, the situation began in 1950 and gave rise to the dispute of 1954.

In the view of India, the situation must be traced back to 1818 and is consequently prior to 1930.

Before examining the Indian argument, it should be said that one cannot avoid the conclusion that Portugal is confusing the dispute and the situation. The fact that there is a culminating point in the dispute, namely, 1954, does not mean that it does not consist of more than one phase, and it was Portugal, in its first oral argument, which described the 1950 and 1953 Notes as "the prelude to the events which are the basis of the present action". To include within the words "facts and situations" the developments of the dispute would be to distort the meaning of those words. The dispute had already begun in 1950 and since it is both a political and legal dispute, it took various forms and passed through several stages.

In so far as India is concerned, since what is involved is merely passage on sufferance, the difficulties and obstacles which that country inflicted on Portugal, which began in 1950 and culminated in 1954, are but progressive manifestations of the dispute which constitute the dispute from its beginning until its end, and not the situation which gave rise to the dispute.

In the view of India, the facts and situations which gave rise to the dispute are those preceding the period 1950-1954, which go back into the past, to 1818, that is to say, the whole period during which passage was exercised.

It is out of this situation, with its ambiguous and equivocal character, that the dispute provoked by the measures taken in

1954 arose. What is here involved is a factual situation: the authorization of passage which was differently understood by each of the Parties: by India, as on sufferance or as an act of grace, and by Portugal, as a right. In reality, the situation is one susceptible of two interpretations. The exercise of passage would not be incompatible with either of those interpretations. In the actual conditions in which it was exercised, that is, by means of separate authorizations, it would appear rather to have been permitted on sufferance. Considered as a right, various elements of a right would appear to be lacking.

Indeed, the fragmentary and individual character of the requests for authorization in respect of each transport, subject to the discretion of the authority to which the requests were addressed, would *prima facie* exclude the conclusion that any general right did exist, and would likewise exclude the possibility that by the repetition of these authorizations a right of passage came into being. The right to refuse passage on any or every occasion is to be assumed from the necessity for a request.

However that may be, the situation which existed before 1930 was identical with that which existed afterwards, an equivocal situation which gave rise to the dispute of 1954, when India took the view that certain political circumstances justified it in finally refusing further to extend this sufferance. The lengthy duration of this sufferance has no bearing upon the character of this passage since, in the absence of any express recognition of right during this long period, there was no change in the equivocal position.

It matters little whether a dispute has or has not arisen expressly with regard to that situation, the priority of date is referable only to the situation and not to the dispute. The Declaration does not say "concerning prior disputes" but "prior situations or facts". It is therefore applicable even if those facts or situations have never given rise to differences between the Parties.

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The fact remains that this situation was prior to 1930, and whatever may be the validity and weight of the arguments adduced by Portugal in support of its conception of this passage as a right, the mere probability of India's conception of passage as on sufferance would be sufficient to justify the objection *ratione temporis*.

Even if it should appear on examination that the view which Portugal has formed or the legal construction which it puts upon this situation is correct, that would in no way alter the fact that the situation existed prior to 1930 and that fact, by itself, and irrespective of the merits of the question, is sufficient to exclude the dispute from the jurisdiction of the Court.

In the *Phosphates in Morocco* case, the Court considered it sufficient as a reason for holding itself without jurisdiction that the

act, which was the subject of the dispute between France and Italy, was merely the application of a dahir of 1920, that is, a date earlier than the ratification of the French Declaration, and held that it was unnecessary to consider whether the dahir was or was not contrary to the international obligations assumed by France.

It follows that even if Portugal could succeed in showing that it did in reality enjoy a right, that possibility is wholly unconnected with the Sixth Objection. If the Court had rejected that Objection, it would have given retroactive effect to the Indian Declaration and would thus have adjudicated upon a situation some two centuries old.

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It is of interest in this connection to recall what the Permanent Court said in the *Phosphates* case as an explanation of the *raison d'être* of this objection *"ratione temporis"*:

> "Not only are the terms expressing the limitation *ratione temporis* clear, but the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise" (p. 24).

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The facts and situations referred to in the Sixth Objection are not the same as the grounds on which the applicant relies, and the argument that the general principles of law and general custom are above and beyond dates is of no relevance in the present case.

These principles and custom do not constitute a situation. They might be a justification for a situation. But what is relevant to this Objection is priority of date, not legality. The fact or situation which is the source of a dispute has a causal connection with that dispute. Legal grounds have not, and cannot have, any such connection.

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The Court has decided to join this Objection to the merits. This joinder is said to be justified, on the one hand, by the connection between the facts relevant thereto and those relevant to the Fifth Objection, and, on the other hand, by the need to have further clarification of the origins of the dispute.

But, in the first place, this Objection is distinct from and independent of the Fifth Objection, and the facts which make up its elements have nothing in common with those pertaining to the Fifth Objection.

In the second place, in order to uphold this Objection, it is necessary only to perceive the relationship between the present dispute and a prior situation said to have given rise to it. But the elements of this relationship are to be found in the documents now before the Court and they have been sufficiently discussed by the Parties. There is no need, in order to reach a conclusion with regard to this relationship, to accumulate facts or to discover any new facts.

In view of all these considerations, I am of opinion that the source of the dispute is the ambiguous and equivocal situation, resulting from a system of individual authorizations depending upon the discretion of the authority granting them, which was understood in different ways by the two Parties. This situation was determined or influenced by political considerations. The dispute arose when, as a result of changed political circumstances, India decided to refuse to continue these authorizations.

This situation having existed since the beginning of the last century, I consider the Objection to be justified and the Court to be without jurisdiction to deal with the dispute.

(Signed) A. BADAWI.