SEPARATE OPINION OF JUDGE KOOIJMANS

Judgment bears testimony to inherent weakness of optional clause system — Reservations to declarations of acceptance of compulsory jurisdiction under Article 36, paragraph 2, of the Statute — Making of such reservations never been controversial if not inconsistent with the Statute itself — Court's finding that Canada's reservation is valid correct interpretation of the law — Canada's reservation made to prevent the Court from scrutinizing the legality of an action it intended to undertake — Consistency of such policy with expressed preference for judicial settlement — Free choice of means and acceptance of compulsory jurisdiction — Optional Clause system an integral and essential part of the Statute. Role of the Court in this respect — Compulsory jurisdiction not just another method of settling legal disputes.

1. I have voted in favour of the Court's finding that it has no jurisdiction to adjudicate upon the dispute submitted by Spain since this dispute comes within the terms of the reservation contained in paragraph 2 *(d)* of the Canadian declaration of acceptance of the Court's compulsory jurisdiction of 10 May 1994. I have done so, however, with a heavy heart, since I am fully aware that this Judgment — although undoubtedly in conformity with international law as it presently stands — bears testimony to the inherent weakness of the system of compulsory jurisdiction under Article 36, paragraph 2, of the Statute, also called the optional clause system, as it has developed in the course of time.

2. Although this system was established in 1920 and reconfirmed in 1945 as an expression of the idea that the settlement of international legal disputes by adjudication is desirable and should be sought if other methods of dispute-settlement have failed or are unable to proffer a solution, it hardly has come near to that ideal in actual practice.

3. It is ironical indeed that the League of Nations, in its efforts to encourage acceptance of the Court's jurisdiction, endorsed the making of reservations to such acceptance (although Article 36, paragraph 3, of the Statute does not formally authorize a declarant State to make such reservations), but by so doing weakened the system it tried to strengthen.

The use of reservations became so widespread and so varied that Professor Humphrey Waldock in 1955 warned that:

"the attitude of States towards the optional clause may degenerate

into one of pure opportunism, declarations being made, cancelled and varied as the immediate interests of States may dictate"[1].

4. The right of a State to make reservations to its declaration of acceptance has long been recognized; in point of fact it never has been even controversial. This is confirmed by the fact that it was not even considered necessary to incorporate it explicitly in the Statute when in 1945 the present Court was established. The San Francisco Conference Subcommittee D to Committee IV/1 stated in its Report of 31 May 1945:

"As is well known, the article (Article 36 of the Statute) has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has therefore been considered unnecessary to modify paragraph 3 in order to make express reference to the right of the states to make such reservations."[2]

5. Since that time controversy only has arisen with regard to the question whether reservations inconsistent with the Statute itself are admissible. Although the Court itself never took position with regard to that question, both in the *Norwegian Loans* case and the *Interhandel* case the so-called "automatic reservation" and its validity under the Statute was a matter for lively debate. According to Judge Lauterpacht and some of his colleagues, Article 36, paragraph 6, of the Statute explicitly authorized the Court and not the declarant State to decide whether in the event of a dispute the Court has jurisdiction. A reservation in which the declarant State reserves for itself the right to determine whether a dispute is essentially within its national jurisdiction is "contrary to an express provision" of the Statute and therefore must be deemed invalid.

6. In his famous separate opinion in the *Norwegian Loans* case Judge Lauterpacht did not doubt, however, for one moment the right of a State to make reservations which cannot be deemed to be contrary to the Statute. He explicitly stated:

"In accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner. As a result there may be little left in the Acceptance which is subject to the jurisdiction of the Court. This the Governments, as trustees of the interests entrusted to them, are fully entitled to do."[3]

[1] C. H. M. Waldock, "Decline of the Optional Clause", *British Year Book of International Law*, Vol. 32, 1955-1956, p. 283.

[2] *UNCIO*, XIII, p. 559, doc. 702.

[3] *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 46.

A similar viewpoint was taken by the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* when it stated:

> "Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations."[4] (Quoted in paragraph 54 of the present Judgment.)

7. Nor have I found in doctrine a tendency to limit the legality — which is something entirely different from the desirability — of making reservations to declarations of acceptance (with the exception of reservations encroaching upon the Statute). I therefore cannot but share the view of the Court, expressed in paragraph 54 of the Judgment, that "[t]he fact that a State may lack confidence as to the compatibility of certain of its actions with international law does not operate as an exception to the principle of consent to the jurisdiction of the Court and the freedom to enter reservations". The Court has to apply the law as it is and I have not found a scrap of evidence in State practice that contradicts the Court's view.

8. Yet, I strongly feel that things should not be left at that. In the present case Canada has modified its declaration of acceptance and introduced a new reservation precisely to prevent the Court from scrutinizing the legality of an action it intended to undertake. In spite of the wide range of reservations made, it was only seldom that a State modified its declaration in anticipation of a certain dispute reaching the Court. Merrills[5] mentions three examples: in 1954 Australia modified its declaration in view of a dispute with Japan over pearl fisheries, in 1955 the United Kingdom entered a reservation to prevent proceedings in respect of the Buraini arbitration and in 1970 Canada added a reservation regarding the enactment of the Arctic Waters Pollution Prevention Act. To this list of examples may now be added the 1994 Canadian reservation.

9. The doubt, or — as the Court puts it — the lack of confidence about the compatibility of intended action with international law which led to the making of a new reservation, was well expressed by the then Prime Minister of Canada in explanation of the reservation made with regard to the Arctic Waters Pollution Prevention Act. On 8 April 1970 he stated in the House of Commons:

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[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para. 59.

[5] J. G. Merrills, "The Optional Clause Today", *British Year Book of International Law*, Vol. 50, 1979, p. 94.

> "Canada is not prepared however to engage in litigation with other states concerning vital issues where the law is either inadequate or non-existent and thus does not provide a firm basis for judicial decision. We have therefore submitted this new reservation . . . relating to those areas of the law of the sea which are undeveloped or inadequate."[6]

A similar reasoning seems to lie at the basis of the Canadian 1994 reservation.

10. As is clear from this statement, a State taking unilateral action on a matter where international law apparently is in a state of flux is well aware of the probability that such actions may lead to disputes with other States. It may prefer to settle such disputes by other means than judicial settlement because it is convinced that such other means may lead to a resolution of the issue which in the end will be more satisfactory for all States concerned. Under present international law States are perfectly entitled to take such a position. In paragraph 56 of the Judgment the Court refers in this respect to the principle of the free choice of means contained in Article 33 of the Charter.

11. In the present case, however, Canada *had* made its choice and *had* made a commitment to a particular method of dispute settlement by accepting the compulsory jurisdiction of the Court. It is true that it had explicitly stipulated in its declaration of 1985 that it could at any time terminate its acceptance of the Court's jurisdiction or add to, amend or withdraw the reservations contained in its declaration and that was exactly what Canada did when it deposited its new declaration on 10 May 1994.

12. A State which is free to terminate its acceptance of the Court's compulsory jurisdiction at any time by the same token is legally free to limit the scope of that acceptance. The question which in my opinion must be put has, therefore, no legal purport but seems nevertheless legitimate. The question which presents itself in the present case (but not for the first time) is: how far can a State go in strengthening the system of compulsory jurisdiction by depositing a declaration of acceptance while at the same time making reservations which impair its effectiveness?

13. The optional clause system was set up as a compromise between those States that favoured a comprehensive system of compulsory judicial settlement and (a minority of) other States which felt that this was not (yet) desirable and therefore not achievable. A State which has accepted the compulsory jurisdiction by depositing a declaration of acceptance indicates thereby that it considers judicial settlement to be the most appropriate method of third party settlement for legal disputes if

[6] Quoted in R. St. J. Macdonald, "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", *Canadian Yearbook of International Law*, Vol. 8, 1970, p. 3.

such disputes cannot be solved amicably. It may subject this acceptance to certain conditions and reservations thereby moving into the direction of those States which found a comprehensive system a bridge too far. By limiting the scope of the Court's jurisdiction in an excessive way, the credibility of the system itself is affected; as a result the declarant State's sincerity in supporting the idea of compulsory jurisdiction is implicitly attenuated as well.

14. In the past this attitude of certain States which limited the Court's jurisdiction in a drastic way has led to laments similar to that of Professor Waldock quoted earlier. A completely different but nevertheless comparable problem presents itself, however, when a State accepts the Court's jurisdiction in a rather generous way, but at a given moment by modifying its declaration deprives the Court of jurisdiction over an anticipated dispute. The confidence in the judicial system and the Court exemplified by the willingness to submit a wide range of conceivable but not imminent legal disputes to judicial settlement is to a certain extent neutralized by the exemption from the Court's jurisdiction of an anticipated and therefore probably imminent dispute.

15. The optional clause system is a fragile system. The high expectations of the founders of the Permanent Court of International Justice have not come true. The prospects of a comprehensive system of compulsory jurisdiction reached their peak in the 1930s but at present it may at best be called a beckoning ideal. Nevertheless, an increasing number of States are finding their way to the Court and also the number of States which have deposited a declaration of acceptance is slowly but steadily increasing. Under these circumstances it would in my opinion not have been beyond the Court's mandate to draw attention to the fragility of the system of compulsory jurisdiction which in the form of the optional clause system is an integral and essential part of the Statute and to the risks to which it is exposed. This all the more so since in its recent Judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, the Court emphasized — be it on a strictly legal basis — the importance of that system.

16. It may be readily admitted that the system of compulsory adjudication is not the key to a peaceful and well-organized world which it was considered to be by many States in 1922 and 1945. Nevertheless its crucial role in a system of dispute settlement and in a world-order in general should by no means be underrated. In this respect it may be appropriate to recall what was said by Professor Bin Cheng during the Conference of the International Law Association held in Tokyo in 1964 in response to a colleague who had said that there are methods of settlement of international disputes which are probably just as good as international adjudication. Maybe Professor Cheng's statement may sound too categorical; it nevertheless contains elements which in my

opinion consider full consideration, maybe today even more than was the case in 1964.

17. On that occasion Professor Cheng said:

> "The acceptance of the compulsory jurisdiction of international tribunals is not only a question of procedure, but is also one of substance. It changes in fact the nature of the law which governs international relations. We may divide international law into . . . different grades. First of all there is international law on the auto-interpretation level. That is when States have not accepted the duty to go before an international tribunal. In such a situation when a dispute arises each party is entitled to maintain its own interpretation of the law."

18. He went on to say:

> "But when a State accepts in advance the duty to submit to international adjudication, it is no longer able to act in that way. It must always behave in such manner that, if brought before the court, its conduct stands at least a fair chance of being upheld. In other words, where a State accepts in advance the duty to go to the International Court or to go to arbitration, the international law that is applicable to it becomes different in nature. One may call this law justiciable or arbitrable law. It is very much superior in quality to the auto-interpretation type of international law."

And Professor Cheng concluded:

> "compulsory adjudication is not just another method of settling international disputes. It raises the international law applicable between the States concerned from the auto-interpretation to the justiciable grade"[7].

19. This view seems to be shared by another learned author who drew attention to the fact that the

> "prevalence of non-judicial settlement in the domestic legal system may result in part from the availability of judicial settlement; each party knows that the cost of its failure to settle may be the other party's recourse to the courts, with all the uncertainty that entails . . . Indeed, the prospect of eventual judicial decision necessarily affects the way the parties think about the law; inevitably, they will bargain

[7] International Law Association, *Report of the Fifty-First Conference*, Tokyo, 1964, pp. 43-44.

and assess the value of various settlement proposals in terms of how they think a court will decide."[8]

20. I certainly do not contend that what is contained in the above quotations is fully reflected in the optional clause system as it has developed until today. Nevertheless I strongly feel that the gist of that content, viz., that compulsory jurisdiction is more than just another method of settling legal disputes, should function as a point of reference for the Court's evaluation of the optional clause system. Since the Court's Judgment — inevitable as it is — does not bring us any nearer to the qualitative criteria referred to here, I have voted for the finding of the Court with dismay; I found it necessary to give expression to my disquiet which is in no way restricted to the present case.

(Signed) P. H. KOOIJMANS.

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[8] Richard Bilder, "International Dispute Settlement and the Role of International Adjudication", in L. Fisler Damrosch (ed.), *The International Court of Justice at a Crossroads*, 1987, pp. 159-160.