SEPARATE OPINION OF JUDGE SIR HERSCH LAUTERPACHT

While I concur in the operative part of the Judgment inasmuch as the Court has declared itself incompetent to decide on the merits of the case submitted to it, I much regret that I do not find myself in agreement with the grounds of the Judgment. As the issues involved are intimately connected with the nature of the decisions of the Court in the matter of its competence, as well as with some basic questions of its obligatory jurisdiction, I consider it my duty to indicate in some detail my own position on the subject.

The Judgment of the Court is based exclusively on the finding that the Court is bound to decline jurisdiction for the reason that Norway has invoked the reservation, operating by virtue of reciprocity, of the French Declaration of Acceptance in which the French Government excluded from the jurisdiction of the Court "matters which are essentially within the national jurisdiction, as understood by the Government of the French Republic".

There are two reasons for which I find myself compelled to dissent from the grounds of the Judgment thus expressed. In the first instance, assuming—an assumption which I must reject—that the French Declaration of Acceptance is a text which is valid in law, the question of jurisdiction must, in my view, be decided by reference to substantive Preliminary Objections advanced by the defendant Government rather than by reference to the subsidiary Objection referred to above. Secondly, and principally, I consider that as, in consequence of the latter reservation, the French Declaration of Acceptance is invalid, there is before the Court no text the reservations of which it can apply. This fact, and not the Norwegian reliance upon the French reservation of matters of national jurisdiction, is in my view the true reason why the Court has no jurisdiction in the present case.

In this Separate Opinion I propose, for the sake of abbreviation, to use the term "automatic reservation" to indicate the French reservation of "matters which are essentially within the national jurisdiction, as understood by the Government of the French Republic". That description expresses the automatic operation of that reservation in the sense that, by virtue of it, the function of the Court is confined to registering the decision made by the defendant Government and not subject to review by the Court.

I

The Preliminary Objections of Norway

In the present case the Government of Norway has challenged the jurisdiction of the Court in reliance upon the following Preliminary Objections:

(1) It has maintained that, as the French application refers to a dispute which is concerned exclusively with Norwegian national law, it is not a dispute falling within the terms of Article 36 (2) of the Statute which, it is alleged, covers only disputes relating to questions of international law.

(2) Secondly, the Government of Norway has maintained that the holders of the loan certificates on whose behalf the French Government considered itself entitled to seise the Court did not previously exhaust the local remedies as required by international law. That Objection is closely related to that referred to above, in the sense that, as repeatedly emphasized by the Norwegian Government in the written and oral proceedings, it is the failure to exhaust local remedies which has prevented the dispute from acquiring the complexion of a dispute concerning international law.

(3) Thirdly, in case "there is still doubt" as to the contention that the dispute is concerned solely with a question of Norwegian law, the Norwegian Government invoked, in reliance upon the provision of reciprocity, the "automatic reservation" incorporated in the French Declaration of Acceptance. As already stated, the Judgment of the Court is based exclusively on that latter Preliminary Objection.

It seems a sound principle of judicial procedure that, unless the provisions of its Statute or other cogent legal considerations make that impossible, the Judgment of the Court should attach to the submissions of the Parties a purpose, though not necessarily an effect, which the Parties attached to them. Applied to objections to the jurisdiction of the Court, that principle means that, when a Party has advanced objections to the jurisdiction of the Court, the decision on the question of jurisdiction must be reached by reference to objections which, in the intention of the Party advancing them, are principal rather than subsidiary and which are substantive rather than formal. This is so in particular in the international sphere where a Government may rightly consider that it should not be treated as having successfully challenged the jurisdiction of the Court on the basis of objections which are ancillary and automatic—at a time when its main effort was directed to jurisdictional objections of substance. It is clear from the written and oral proceedings that Norway, far from putting forward the "automatic reservation" as the main objection, intended to rely upon it only in a subsidiary manner and in the last resort—only if "there is still

doubt" as to the principal preliminary objection. This explains why, after having invoked the "automatic reservation" in a subsidiary manner in the original document entitled *"Preliminary Objections of Norway"*, the Norwegian Government did not subsequently on a single occasion refer to it, except generally and indirectly. That Objection, though not formally withdrawn, was kept in the background throughout the proceedings—a reticence explained by the disinclination of a Government to rely primarily upon an objection the success of which depends on the bare assertion of the will of that Government. In my opinion, a Party to proceedings before the Court is entitled to expect that its Judgment shall give as accurate a picture as possible of the basic aspects of the legal position adopted by that Party. Moreover, I believe that it is in accordance with the true function of the Court to give an answer to the two principal jurisdictional questions which have divided the Parties over a long period of years and which are of considerable interest for international law. There may be force and attraction in the view that among a number of possible solutions a court of law ought to select that which is most simple, most concise and most expeditious. However, in my opinion such considerations are not, for this Court, the only legitimate factor in the situation.

Accordingly, although I am of the opinion that there is before the Court no valid Declaration of Acceptance by reference to which it can assume jurisdiction, I consider it my duty to state my opinion as to the principal Preliminary Objections of Norway. Apart from a partial objection referred to below, these were the only two jurisdictional objections which were argued before the Court.

There are two other Preliminary Objections which figure in the written and oral proceedings and to which only passing reference need be made. In one, subsequently withdrawn, Norway asserted that the subject-matter of the dispute did not fall within the terms of the French Declaration of Acceptance which limited the Acceptance to "disputes which may arise in respect of facts or situations subsequent to the ratification" of the Declaration of Acceptance. Another Objection had reference to one portion of the claim only. In it Norway contended that, as some of the loans in question were contracted not by the Norwegian State but by certain Banks not identical with it, Norway could not properly be made a respondent in respect of that part of the claim. It is not necessary to examine here that particular Objection—which I do not consider to be well founded.

* * *

With regard to the first Preliminary Objection referred to above I am unable to accept the view that the subject-matter of the

present dispute is not related to international law but exclusively to the national law of Norway. Undoubtedly, the question of the interpretation of the contracts between the Norwegian State and the bondholders is primarily a question of Norwegian law. It is not disputed that the Norwegian law is the proper law of the contract and that it is for the Norwegian courts to decide what Norway had actually promised to pay. However, the complaint of the French Government is that, having regard to the currency legislation suspending the operation of the gold clause, the Norwegian law which the Norwegian courts are bound to apply in this case is contrary to international law. The Norwegian courts may hold that the gold clause in the bonds is a gold coin clause (as distinguished from a gold value clause), that that gold coin clause has been rendered inoperative as the result of the legislation in question, and that the existing currency is, therefore, a lawful means of payment. In the view of the Norwegian Government this is the proper interpretation of what it has in law promised to pay. However, it is that very legislation, in so far as it affects French bondholders, which may be the cause of violation of international law of which France complains.

It may be admitted, in order to simplify a problem which is not at all simple, that an "international" contract must be subject to some national law; this was the view of the Permanent Court of International Justice in the case of the Serbian and Brazilian Loans. However, this does not mean that that national law is a matter which is wholly outside the orbit of international law. National legislation—including currency legislation—may be contrary, in its intention or effects, to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law. There may be little difference between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract. For these reasons it is difficult to accept the argument of Norway to the effect that as this Court can decide only on the basis of international law and that as the main substantive question in the dispute is the interpretation of Norwegian law, this is not a dispute which is covered by Article 36 (2) of the Statute. The dispute now before the Court, although it is connected with the application of Norwegian law, is also a dispute involving international law. It is possible that if the Court had jurisdiction on the merits it would find that Norway has not violated any rule of international

law by declining to repay the bonds in gold. However, in finding that, the Court would apply international law.

The greater part of the written and oral argument of Norway—as well as that of the applicant State—has been devoted to a consideration of the relevant questions of international law. The question of the treatment by a State of property rights of aliens—including property rights arising out of international loans—is a question of international law. So is the question whether, in this respect, equality of treatment of nationals and aliens relieves a State of its international responsibility. So is, further, the question whether there is in this respect a difference between resident aliens and aliens resident abroad. It may be also difficult to deny that the allegation of discriminatory treatment as between French and non-Norwegian bondholders raises an issue of international law. The very question whether local remedies have been exhausted—a question on which Norway has made dependent the international character of the dispute—is a question of international law. Finally, although there seems to be little substance in the contentions advanced by the French Government on the subject of The Hague Convention of 1907 relating to Contract Debts in so far as it is alleged to impose an obligation to arbitrate, it is relevant to state that that Convention indirectly recognizes that controversies of that character are suitable for settlement by reference to public international law. It is of interest, in this connection, to note the wording of Article 53 of The Hague Convention of 1907 for the Pacific Settlement of International Disputes which refers expressly, as suitable for arbitration before the Permanent Court of Arbitration, to disputes "arising from contract debts claimed from one Power by another Power as due to its nationals".

The relevance of these questions of international law cannot properly be denied by reference to the fact that unless and until Norwegian courts have spoken it is not certain that there has been a violation of international law by Norway. The crucial point is that, assuming that Norwegian law operates in a manner injurious to French bondholders, there are various questions of international law involved. To introduce in this context the question of exhaustion of local remedies is to make the issue revolve in a circle. The exhaustion of local remedies cannot in itself bring within the province of international law a dispute which is otherwise outside its sphere. The failure to exhaust legal remedies may constitute a bar to the jurisdiction of the Court; it does not affect the intrinsically international character of a dispute.

This being so, my view is that, in principle, the present dispute is also one of international law and that it comes within the orbit of controversies enumerated in Article 36 (2) of the Statute of the Court.

* * *

In my opinion, the Preliminary Objection of Norway relating to exhaustion of local remedies is well founded. This does not mean that the position of the French Government on the subject is altogether without merit. For the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it. In the present case, while, as will be suggested presently, the Court cannot regard it as conclusively proven that the Norwegian courts would refuse a remedy, it is clear that in general their decision must be based on Norwegian law, including the legislation of 1923 which is alleged to result in an injury to the legitimate rights of French bondholders. From that point of view I can appreciate the contention of the French Government that there are no effective remedies to be exhausted—even if I must hold that, however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them.

Also, inasmuch as the case of the French Government is based on the allegation of discriminatory treatment as between French bondholders on the one side and Swedish and Danish bondholders on the other, it is not easy to see what remedy the Norwegian courts could provide against governmental acts which, as such, cause no injury to French bondholders.

However, these doubts do not seem strong enough to render inoperative the requirement of previous exhaustion of local remedies. The legal position on the subject cannot be regarded as so abundantly clear as to rule out, as a matter of reasonable possibility, any effective remedy before Norwegian courts.

The Norwegian Government has contended that the burden of proving the inefficacy of local remedies rests upon France. There is, in general, a degree of unhelpfulness in the argument concerning the burden of proof. However, some *prima facie* distribution of the burden of proof there must be. This being so, the following seems to be the accurate principle on the subject: (1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had; (2) no such proof is required if there exists legislation which on the face of it deprives the private claimants of a remedy; (3) in that case it is for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed; (4) the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting. Both in the written and the oral proceedings the Government of Norway has attempted to adduce such proof. Whatever may be its cogency, it must be

regarded as sufficient for the purpose.

In the first instance, in matters of currency and international loans the decisions of courts of various countries—including those of Norway—have not been characterized by such a pronounced degree of uniformity and certainty as to permit a forecast, with full assurance, of the result of an action in Norwegian courts. The decision of the Permanent Court of International Justice in the Brazilian and Serbian Gold Clause cases has been followed by courts of some countries but not by those of others. While the courts of most States have interpreted the gold coin clause as importing necessarily a gold value clause, this has not been the practice in all countries. Moreover, the courts of the same State have often shown considerable divergencies and hesitation on the subject. Thus, in England, in the two important cases relating to the gold clause—*The King* v. *International Trustee for the Protection of Bondholders* [1937] A.C. 500, and *Feist* v. *Société Intercommunale Belge d'Électricité* [1934] A.C. 161—it was left to the House of Lords to reverse the decisions of the Court of First Instance and of the Court of Appeal. While French courts have, with some uniformity, refused to recognize the *cours forcé* in international contracts, it appears that they have done so on different and diverging grounds. In some cases they have acted on the principle according to which a foreign public law can only operate within the territory of the State in question; in other cases they have applied the principle of the autonomy of the will, which makes it possible for the parties to exclude the operation of any national legal system whatsoever; in other cases still they have acted on the view that while the operation of the gold clause is subject to the law of the State concerned, it is so only within the limits of public policy. This being so, there may be no sufficient reason for drawing final conclusions from the alleged previous practice of Norwegian courts and for asserting that it has been conclusively proven that there is in this case no remedy available under Norwegian law. It is possible—however unlikely, in the view of the French Government, that possibility may be—that the Norwegian courts may hold that the bonds embodied a true gold clause and that, having regard to international law or the constitutional law of Norway, the law of 1923 cannot be applied or that it must be applied so as not to injure the French bondholders.

I cannot consider it as a certainty that, assuming that the Norwegian legislation on the subject is contrary to international law in so far as it affects aliens, no remedy at all is possible under Norwegian law. There has been a tendency in the practice of courts of many States to regard international law, in some way, as forming part of national law or as entering legitimately into the national conception of *ordre public*. Although the Norwegian Government

has admitted that in no case can a Norwegian court overrule Norwegian legislation on the ground that it is contrary to international law, it has asserted that it is possible that a Norwegian court may consider international law to form part of the law of the Kingdom to the extent that it ought, if possible, to interpret the Norwegian legislation in question so as not to impute to it the intention or the effect of violating international law. Also, it seems a fact that in certain matters Norwegian courts have the power to review the acts of the legislature, in particular from the point of view of their conformity with the constitution. This, it has been asserted, may mean that Norwegian courts might refuse to give retro-active effect to the legislation in question. These possibilities may be remote. They are not so absolutely remote as to deserve to be ruled out altogether.

Secondly, it is difficult to admit, having regard to the long history of the present dispute and the negotiations relating thereto, that the French Government has given a sufficient explanation of the failure of the French creditors to seek a remedy before Norwegian courts. No persuasive reason has been adduced why the French Government, by encouraging an attempt to exhaust local remedies, has not assisted in eliminating the possibility of that Preliminary Objection. The delay resulting from any such attempt would have been relatively small in comparison with the long period of years consumed by the protracted negotiations on the subject. There seems to run through the submissions of the French Government the apprehension that after Norwegian courts have finally dismissed the claim of the French creditors the only claim internationally available to the French Government would be that on account of denial of justice. This is probably not so. A final adverse decision of Norwegian courts would still leave it possible to the French Government to contend that Norwegian legislation, as finally upheld by Norwegian courts, is contrary to international law. No decisive importance can be attached to the view that, seeing that the Norwegian Government repeatedly reiterated that it was prevented by the Norwegian Law to effect payment in gold, the French bondholders were entitled to assume that they have no remedy under Norwegian law. The Norwegian Government, being an interested party, was not for this purpose an authorised interpreter of Norwegian law. It was for the bondholders, by bringing an action before Norwegian courts, to attempt to show that the Norwegian Government was mistaken in its interpretation of Norwegian law. If the courts held that that interpretation was correct, then the road to international proceedings would no longer be blocked by the objection based on the failure to exhaust local remedies. I must, therefore, although with some hesitation, consider that objection as well founded.

* * *

In invoking the "automatic reservation" the Government of Norway apparently was of the opinion that what it did was no more than to invoke it in aid—in decisive aid, if need be—of the contention, previously advanced, that the dispute is not concerned with international law and that it does not therefore fall within the orbit of Article 36 (2) of the Statute by reference to which Norway accepted the obligatory jurisdiction of the Court. Actually these two questions are not identical. A dispute may be essentially within the national jurisdiction of a State (i.e. covered by the terms of the "automatic reservation") while being at the same time a dispute concerning a question of international law.

If the Court were called upon to determine itself whether the subject-matter of the present dispute is essentially within the domestic jurisdiction of Norway it would be confronted with a difficult task. It is possible to hold that, although—contrary to the view expressed by the Norwegian Government—the dispute is also one of international law, it nevertheless arises out of a matter essentially within the jurisdiction of the State seeing that questions of currency are essentially within the national jurisdiction. In that case the Preliminary Objection based on the French reservation would be valid in its own right—quite apart from the right of unilateral determination. There is the alternative view that if a dispute is also concerned with international law then it is no longer exclusively within the national jurisdiction; that the terms "exclusively" and "essentially" are substantially identical; and that, therefore, the subject-matter of the present dispute is not essentially within the national jurisdiction of Norway. However, the Norwegian Government has attached no importance to elaborating that distinction. It not only stated, in the minimum of words, that the matter is essentially within the national jurisdiction of Norway; it stated that it said so and that it said so with finality.

The determination thus made was advanced in a subsidiary manner at the initial stage of the proceedings. It was subsequently kept in the background and invoked only by studious indirection. It was never formally withdrawn. It provided the exclusive basis for the Judgment of the Court which, on this question, says in effect as follows: According to the Norwegian Government the issue is one essentially within the domestic jurisdiction of Norway. That view may be ill-founded. However, it is the view of the Norwegian Government. As such it is decisive for the purpose of jurisdiction of the Court—just as if the French Government were the defendant State its view to that effect would be decisive by virtue of the reservation as formulated by it. The Court must accept that view not because it agrees with it, but because it is

the view of the Norwegian Government. Its accuracy is irrelevant. This is the inescapable result of the condition under which France —and consequently Norway—accepted the jurisdiction of the Court. That preliminary Objection of Norway is quite peremptory, fully effective to the point of being automatic, and is not subject to review by the Court.

I have given reasons why, in my view, the "automatic reservation", being of a subsidiary character, was not in any case calculated to provide an exclusive basis of the Judgment of the Court. However, apart from that aspect of the question and whatever may be the position with regard to the validity of the French Acceptance as a whole, it is my view that it was not open to the Court to act on that particular reservation. This is so for the reason that I consider it legally impossible for the Court to act in disregard of its Statute which imposes upon it the duty and confers upon it the right to determine its jurisdiction. That right cannot be exercised by a party to the dispute. The Court cannot, in any circumstances, treat as admissible the claim that the parties have accepted its jurisdiction subject to the condition that they, and not the Court, will decide on its jurisdiction. To do so is in my view contrary to Article 36 (6) of the Statute which, without any qualification, confers upon the Court the right and imposes upon it the duty to determine its jurisdiction. Moreover, it is also contrary to Article 1 of the Statute of the Court and Article 92 of the Charter of the United Nations which lay down that the Court shall function in accordance with the provisions of its Statute. It is that question which I now propose to consider in connection with the examination of the validity of the French Acceptance.

II

The Validity of the French Declaration of Acceptance

1. *Is the "automatic reservation" consistent with the Statute?*

I have stated the reasons for which, if I felt free to do so, I would reject all Preliminary Objections of Norway with the exception of that relating to the exhaustion of local remedies. However, I do not feel free to decide the question of jurisdiction on these grounds. To do so would be to admit that the Court is confronted with a valid instrument of acceptance of its jurisdiction on the part of France. In my view it is impossible to admit that. I consider that as the French Declaration of Acceptance excludes from the jurisdiction of the Court "matters which are essentially within the national jurisdiction as understood by the Government of the French Republic"—the emphasis being here on the words "as understood by the Government of the French Republic"—it is for the reason

of that latter qualification an instrument incapable of producing legal effects before this Court and of establishing its jurisdiction. This is so for the double reason that: *(a)* it is contrary to the Statute of the Court; *(b)* the existence of the obligation being dependent upon the determination by the Government accepting the Optional Clause, the Acceptance does not constitute a legal obligation. That Declaration of Acceptance cannot, accordingly, provide a basis for the jurisdiction of the Court. Norway has not accepted the jurisdiction of the Court on any other basis. The Court therefore has no jurisdiction.

As stated, the first reason for that view is that that particular part of the acceptance of the Optional Clause on the part of the French Republic is contrary to the Statute of the Court. In the reservation in question the Government of France says in effect: If a Government brings an application before the Court in reliance on the French acceptance of the jurisdiction of the Court and if the Government of France maintains that the Court has no jurisdiction on the ground that the subject-matter of the dispute is essentially within the domestic jurisdiction of France, then the Court has no power to decide upon that particular allegation; it must accept as binding the French understanding of the legal position on the subject.

If that type of reservation is valid, then the Court is not in the position to exercise the power conferred upon it—in fact, the duty imposed upon it—under paragraph 6 of Article 36 of its Statute. That paragraph provides that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court". The French reservation lays down that if, with regard to that particular question, there is a dispute between the Parties as to whether the Court has jurisdiction, the matter shall be settled by a decision of the French Government. The French reservation is thus not only contrary to one of the most fundamental principles of international—and national—jurisprudence according to which it is within the inherent power of a tribunal to interpret the text establishing its jurisdiction. It is also contrary to a clear specific provision of the Statute of the Court as well as to the general Articles 1 and 92 of the Statute and of the Charter, respectively, which require the Court to function in accordance with its Statute.

Now what is the result of the fact that a reservation or part of it are contrary to the provisions of the Statute of the Court? The result is that that reservation or that part of it is invalid. Some examples may usefully illustrate that aspect of the question: What would be the position if in accepting—or purporting to accept—the obligations of Article 36 of the Statute, a State were to exclude the operation of paragraph 6 of that Article not only with regard to one reservation but with regard to all reservations or, generally, with regard to any disputed question of the jurisdiction of the Court?

What would be the position if the Declaration were to make it a condition that the oral proceedings of the Court shall be secret; or that its Judgment shall not be binding unless given by unanimity; or that it should contain no reasons; or that no Dissenting Opinion shall be attached; or that Judges of certain nationality or nationalities shall be excluded; or that, contrary to what is said in Article 38 of its Statute, the Court shall apply only treaties and custom in the sense that it shall not be authorized to apply general principles of law as recognized by civilized States and that if it is unable to base its decison on treaty or custom it shall pronounce a *non liquet?* What would be the position in the case of any such reservation?

It might be said that some of these examples are hypothetical and farfetched. In fact they are less farfetched than the particular instance here discussed—the instance of a reservation according to which a Government claims, after it has submitted to the compulsory jurisdiction of the Court, the right to determine for itself, after the dispute has arisen and been brought before the Court, whether the Court has jurisdiction. Neither is it accurate to say that these examples are irrelevant seeing that while the Statute as interpreted in practice permits reservations to its jurisdiction it does not permit reservations as to the functioning and the organization of the Court. For, assuming that distinction to be valid, the reservation here discussed pertains to the functioning of the Court in the matter of its jurisdiction.

Clearly the Court cannot act otherwise than in accordance with its Statute. By way of illustration reference may be made here to the case of the *Free Zones* in which the Court stated that it "cannot, on the proposal of the Parties, depart from the terms of the Statute" —a statement made in response to a request of the parties that the Court should communicate to them unofficially the result of its deliberations (Series A, No. 22, p. 12). The Court acted in that way although at that time it was not bound by the express provisions of the Charter and the Statute requiring it to act in accordance with its Statute. In a different sphere, in its Advisory Opinion of 7 June 1955 concerning the *Voting Procedure of the General Assembly in the Matter of Petitions from South West Africa,* the Court was of the view that it was legally impossible for the General Assembly to reach decisions on these questions in accordance with a voting system "entirely alien to that prescribed by the Charter" (*I.C.J. Reports 1955,* p. 76). There was in that case room for the argument that voting being to some extent a matter of procedure the General Assembly enjoyed some latitude in the matter. This was not the view of the Court. It based its Opinion on the principle that an organ cannot act except in accordance with its constituent instrument. In the present case the acceptance of the jurisdiction of the Court is made dependent on a condition which radically departs from the Statute—which is in clear contradiction with the Statute—

with regard to a fundamental aspect of the functioning of the Court. It would seem that, for that reason, the French Declaration of Acceptance would be invalid even if the particular issue which is connected with its invalidity did not arise in the case now before the Court. But that particular issue does arise. The Norwegian Government invoked that particular reservation and, although it has kept it in the background, it has not withdrawn it.

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. Their right to append reservations which are not inconsistent with the Statute is no longer in question. But the question whether that little that is left is or is not subject to the jurisdiction of the Court must be determined by the Court itself. Any conditions or reservations which purport to deprive the Court of that power are contrary to an express provision of the Statute and to the very notion, embodied in Article 36 (6), of conferment of obligatory jurisdiction upon the Court. As such they are invalid. It has been said that as Governments are free to accept or not to accept the Optional Clause, they are free to accept the very minimum of it. Obviously. But that very minimum must not be in violation of the Statute.

If the Court cannot function except in conformity with its Statute then, when confronted with an Acceptance containing a reservation which is contrary to a provision of the Statute, it must consider that reservation as invalid. This is not a conclusion of juridical refinement. It is the result of the fact that the Statute of the Court is the basis and the very source of the Declaration of Acceptance. The Declaration does not exist except by virtue of the Statute. It does not legally exist unless it is in accordance with it. In this connection mention may be made of the legal principle generally recognized in municipal law according to which a condition, in a contract or in any other legal instrument, that is contrary to a fundamental principle of judicial organization is invalid. That principle is recognized with some precision in French law.

How does it come to pass that, in formulating their acceptance of the jurisdiction of the Court, Governments — for this form of Acceptance has not been confined to the Government of France—deem themselves free to disregard the Statute of the Court to which they are parties? It would be inaccurate to explain that attitude by reference to any absence of familiarity with the terms of the Statute. The relevant provisions of the Statute were clearly before the authors of the Declaration and they were considered by them with reference to the very question here discussed. This is not a question whether the Court ought to give encouragement, direct or indirect, to any such attitude of indifference to its Statute. The Court is not

concerned with safeguarding the dignity of its Statute—though it is concerned with safeguarding its authority. However that may be, the deliberate character of the disregard of the Statute of the Court by the authors of the Declaration has a bearing upon the effects, in the sphere of nullity, of the Declaration thus made. For it rules out the admissibility of any attempt to bring it somehow, by way of interpretation, within the four corners of conformity with the Statute and thus to salvage it as a valid legal declaration.

Moreover, the particular reservation now at issue is not one that is contrary to some merely procedural aspect of the Statute. It is contrary to one of its basic features. It is at variance with the principal safeguard of the system of the compulsory jurisdiction of the Court. Without it, the compulsory jurisdiction of the Court being dependent upon the will of the defendant party, expressed subsequent to the dispute having been brought before the Court, has no meaning. Article 36 (6) is thus an essential condition of the system of obligatory judicial settlement as established in the Statute. That provision was inserted in the Statute with the deliberate intention of providing an indispensable safeguard of the operation of the system. Article 36 (2) speaks of the recognition by the parties to the Statute of the "compulsory" jurisdiction of the Court. But there is no question of compulsory jurisdiction if, after the dispute has arisen and after it has been brought before the Court, the defendant State is entitled to decide whether the Court has jurisdiction.

* * *

Reference may be made to two arguments adduced with the object of bringing the "automatic reservation" within the orbit of conformity with Article 36 (6) of the Statute: In the first instance, it has been said that if the Court declines jurisdiction by reference to the "automatic reservation" it is actually, in full conformity with Article 36 (6), making a decision on the question of its jurisdiction. This argument is of a verbal character. For in that case it is not the Court which makes the actual decision on the question of its jurisdiction. The decision is made by the defendant Government of Norway. The Court merely registers it. Moreover, the Court says so in its Judgment. It states in effect that its task is confined to registering the decision of the defendant State—a decision which it is entitled to make by virtue of the operation of reciprocity.

The second argument intended to show that the French reservation is not contrary to Article 36 (6) of the Statute is as follows: If a Government, in conformity with its reservation, has made the determination that a matter is essentially within its national jurisdiction, then there is no dispute as to the question of jurisdiction. For the fact that the Government concerned has made that determination is not in dispute and, therefore, it would seem that

the question of Article 36 (6) has no relevance in this connection; at most, the application of Article 36 (6) is confined to registering the fact that the determination has been made by the defendant State. This argument is, once more, of a dialectical character. For what is actually the position? A Government brings a case before the Court and maintains in its Memorial that the subject of the dispute is one of international law. The defendent State asserts in its Preliminary Objections that in its opinion that matter is essentially within its domestic jurisdiction. There is thus a dispute between the Parties on the question of the jurisdiction of the Court. However, having regard to the "automatic reservation", that dispute cannot be determined by the Court. It is determined by the Government concerned. This is exactly the position in the present case. If we look at the substance of the matter, there is little doubt that the reservation is based on the intention—and has the effect of—divesting the Court of the power conferred upon it by Article 36 (6).

2. *Is the "automatic reservation" consistent with the requirements of a legal obligation to submit to the jurisdiction of the Court?*

I have given reasons why I consider that the "automatic reservation", inasmuch as it embodies the claim of one party to make a decision, binding upon the Court, with regard to the contested question of its jurisdiction is invalid as being contrary to the Statute of the Court.

I arrive at the same conclusion on the second—and different—ground, namely, that having regard to the formulation of the reservation of national jurisdiction on the part of the French Government the Acceptance embodying the "automatic reservation" is invalid as lacking in an essential condition of validity of a legal instrument. This is so for the reason that it leaves to the party making the Declaration the right to determine the extent and the very existence of its obligation. The effect of the French reservation relating to domestic jurisdiction is that the French Government has, in this respect, undertaken an obligation to the extent to which it, and it alone, considers that it has done so. This means that it has undertaken no obligation. An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose.

It is irrelevant for the purpose of the view here outlined whether the instrument of acceptance of the obligation of the Optional Clause is a treaty or some other mode of creating obligations. In the *Anglo-Iranian Oil Company* case the Court observed that "the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States" but that "it is the result of unilateral drafting by the Government of Iran" (*I.C.J. Reports*

1952, p. 105). The statement means no more than that the declaration is the result not of negotiations but of unilateral drafting. Whether it is a treaty or a unilateral declaration, it is—if it is to be treated as a legal text providing a basis for the jurisdiction of the Court—a manifestation of intention to create reciprocal rights and obligations. It will be noted that Article 36 (2) refers to the acceptance of the jurisdiction of the Court in relation "to any other State accepting the same *obligation*". In fact there is no difficulty in visualizing the Declaration of Acceptance as an accession to a multilateral treaty in the same way as, in the case of various conventions concluded under the auspices of the United Nations, Governments accede to a text established by the General Assembly. However that may be, the acceptance of the Optional Clause is an instrument purporting to bring about, as between the accepting State and any other State which has accepted or may accept that text, reciprocal rights and obligations. If the acceptance does not, in law, amount to an assumption of an obligation effectively binding upon the Government concerned, it is not a valid instrument upon which the accepting State can rely and of which the Court can take cognizance. If a Government declares that it accepts the compulsory jurisdiction of the Court unless, in cases which cover potentially the entire field of possible disputes, it determines, after the dispute has come before the Court, that the Court has no jurisdiction, then the declaration thus made constitutes no legal undertaking and cannot be treated as a legal instrument constituting an undertaking.

The proposition here advanced—namely, that an undertaking in which the applicant party reserves for itself the exclusive right to determine the extent or the very existence of its obligation is not a legal undertaking—is so self-evident as a matter of juridical principle that it is not necessary to elaborate this point by showing it to be a generally recognized principle of law which the Court is authorized to apply by virtue of Article 38 of its Statutes. It is a general principle of law as it results from the legislation and practice of courts in various countries in the matter of contracts and other legal instruments. These are treated as invalid whenever the object of the obligation is reserved for the exclusive determination of the party said to be bound by the obligation in question. (Reference may be made here to the position in French law as summarized in the leading treatise by Planiol and Ripert. They state, when dealing with the general conditions of the validity of the contract, that the freedom of the party to determine the object of its obligation negatives the legal nature of the agreement (*Traité pratique de droit civil français*, vol. vi, 2nd ed., 1952, Section 220: "Détermination de l'objet"). In dealing with so-called potestative conditions, they refer to purely potestative conditions dependent upon the will of the debtor and covered by Article 1174 of the Civil

Code which provides that "an obligation is null if contracted under a potestative condition on the part of the obligor" (*ibid.*, vol. vii, Section 1028). It is not desirable to prolong this Opinion by an examination of English law and of the law of the United States of America on the question. With regard to the latter, reference may be made to the leading treatise on the subject, namely, Williston's "On Contracts" (revised edition, vol. i (1936), § 43) where, in the light of numerous judicial decisions, the freedom of a party to determine the object of its obligation is represented as negativing the legal nature of the agreement. The importance attached to the necessity of a clear determination of the subject-matter of the obligation may be seen from the fact that French courts have held that a contract providing that a party shall be entitled to purchase goods in accordance with a price to be agreed separately is ineffective and unenforceable. In some other countries the courts have held that in such cases reasonable terms are to be fixed by the courts—a solution which, in a different sphere, is in the present case excluded by the terms of the automatic French reservation.)

That general principle of law is, in turn, no more than a principle of common sense. Applied to the present case, that principle signifies that if the element of legal obligation is non-existent or negligible it must follow that the instrument is not a legal instrument upon which a State can rely as a matter of right for the purpose of invoking the jurisdiction of the Court. Instruments—whether by way of treaties, unilateral declarations, and other texts—cognisable before a court of law and relied upon for obtaining redress must be instruments creating legal obligations. It is irrelevant for this purpose that, having regard to public opinion, an enlightened State is not likely to invoke any such reservation capriciously, unjustifiably, and in bad faith. These are expectations which may or may not materialize. The decisive factor is that the State concerned is not willing to leave a decision on the question to the impartial judgment of the Court but that it insists on its own determination of the issue. Neither is it feasible to try to inject a legal element into the Declaration thus formulated by using phraseology such as that the undertaking in question is binding subject to a resolutive condition dependent upon the promising party. Upon analysis that phrase means no more than that the undertaking is binding so long as the dispute has not been brought before the Court but that its binding force becomes a matter of discretion of the defendant State once the Court has been seised of the dispute.

It may be argued that, after all, the interpretation of disputed provisions of treaties is not, in the absence of agreement, subject to the compulsory jurisdiction of international courts and that nevertheless that fact does not deprive the treaties in question of their character as binding legal instruments. The answer is that in these

treaties the object of the obligation is determined and that neither party is accorded the right of unilateral determination which the other party is bound to accept. Moreover, in the present case the absence—the deliberate exclusion—of the jurisdiction of the Court refers to the very ascertainment of the jurisdiction ostensibly conferred upon it in what purports to be a legal text.

* * *

I have given reasons why, inasmuch as the French Declaration of Acceptance leaves it to the declaring Government to determine both the existence and the extent of the obligation undertaken by France, it does not constitute a legal obligation essential to the validity of a legal text. I will now consider whether there are any factors which may legitimately mitigate the apparent rigour of these consequences.

It might be said that matters which are essentially within national jurisdiction constitute only one part of the potential number of controversies which may come before the Court; that with regard to others the element of legal obligation fully subsists; and that therefore the Acceptance as a whole may still be capable of being regarded as a valid legal instrument. There is little persuasive force in any such argument. The reservation of matters essentially within the domestic jurisdiction of a State as understood by that State is so wide as to cover, at the option of the State concerned, practically all disputes in which it may be involved.

For, in the first instance, it will be noted that the French reservation in issue refers not to matters which are *according to international law exclusively* within the domestic jurisdiction of the State, but to matters which are *essentially* within the domestic jurisdiction. There are matters which have often been considered as being essentially within the domestic jurisdiction of States but which, having become regulated by treaty or custom, have ceased to be so—an aspect of the question for which the Advisory Opinion of the Permanent Court of International Justice in the case of *Tunis and Morocco Nationality Decrees* provides an instructive and authoritative illustration. Tariffs, immigration, treatment of aliens and citizens in national territory, internal legislation generally—all those matters have been claimed to be essentially within the domestic jurisdiction of States. It is not necessary for me to express an opinion on the subject. However, even if that claim is admitted, those are not necessarily matters which according to international law are exclusively within the domestic jurisdiction of the State—though, as stated, they have often been described as being matters of domestic jurisdiction or essentially of domestic jurisdiction. Practically every aspect of the conduct of the State may be, *prima*

facie, within that category for the reason that normally the State exercises its activity within its national territory, or, on the high seas, in relation to its ships which for some purposes are considered by States to form part of its territory. In the *Lotus* case the Court was prepared to base its decision, to some extent, on the view that the ship affected was Turkish territory and that the offence was therefore committed in Turkey. For these reasons it is possible for a State to maintain, without necessarily laying itself open to an irresistible charge of bad faith, that practically every dispute concerns a matter essentially within its domestic jurisdiction. Most Judgments given by this Court and its predecessor—with the exception of those concerned with territorial disputes—have been given in relation to matters bearing on the activity of the State within its jurisdiction and related to its national legislation and administration. These are the typical occasions giving rise to State responsibility. This aspect of the question is elaborated in more detail in the examination, which follows, of the power of the Court to review the determination made by a Government in pursuance of the "automatic reservation".

If thus practically every matter can be plausibly, though not necessarily accurately, described as a matter essentially within the domestic jurisdiction of the State concerned and if that State is the sole judge of the question, it is clear that, as the result, the element of legal obligation is reduced to a vanishing point.

* * *

I will now examine the view that, although a State reserves for itself the right to determine whether a matter is essentially within its domestic jurisdiction, such determination must be effected in accordance with the legal obligation to act in good faith and that to that extent there is in existence a valid legal obligation and a valid legal instrument. I myself expressed a view to that effect in my *Report on the Law of Treaties* which I submitted in 1953 as member of the International Law Commission. In the light of further study of this question in connection with the present case, I do not feel it possible to adhere to that view. The legal obligation of a Government to avail itself of its freedom of action in a manner consistent with good faith has a meaning, in terms of legal obligation, only when room is left for an impartial finding whether the duty to act in accordance with good faith has been complied with. But in the case now before the Court any such possibility has been expressly excluded. The Court has no power to give a decision on the question whether a State has acted in good faith in claiming that a dispute covers a matter which is essentially within its domestic jurisdiction. If the Court were to do so, it would

be arrogating to itself a power which has been expressly denied to it. Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law. The Governments which have appended the "automatic reservation" have not questioned their legal obligation to invoke it in good faith, that is to say, not capriciously and arbitrarily. But it is abundantly clear from the evidence which is generally available that the authors of the "automatic reservation" have reserved for the Governments concerned the right to judge whether in invoking it in a particular case they have complied with the obligation to act in good faith. They have repeatedly declared that their own sense of international duty and propriety, public opinion within and outside their countries, and their reputation and prestige in the world would constitute a restraining factor of great potency in shaping their decision. But they have denied to the Court the power to determine the legality of that decision from the point of view of the obligation to act in good faith or otherwise. They have reserved that power to themselves.

For this reason I cannot accept as accurate the view expressed in the following terms in paragraph 26 of the Norwegian "Preliminary Objections": "Of course, such a reservation must be interpreted in good faith and should a government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a 'matter which is essentially within the the national jurisdiction' it would be committing an *abus de droit* which would not prevent the Court from acting." The Court has no such power. It cannot arrogate to itself the competence—which has been expressly denied to it—to find that the assertion of the defendant State that a matter is essentially within its domestic jurisdiction is so extravagant and so arbitrary as to amount to an action in bad faith and to an abuse of right, with the result that the Court is entitled to ignore or to override the determination thus made. As already stated, in view of the comprehensiveness of the term "matters essentially within domestic jurisdiction", it is not easy to conceive situations of any such obviousness. It is not certain that a State would be acting flagrantly and irrefutably in disregard of the canons of good faith if it were to determine most disputes as coming within its domestic jurisdiction.

The question of the obligation to act in good faith arises only in relation to legitimate expectations of the other party. But there is only a nominal degree of legitimate expectation in relation to an obligation, in regard to a potentially most comprehensive category of disputes, as to which the party undertaking it expressly declares in advance that it is free to determine both the existence and the degree of its obligation. As already stated, the attitude of a Government in most disputes is as a rule adopted in pursuance of its internal legislation or other form of authorization determined by its national law. To that extent it is arguable—perhaps inaccurately but not

necessarily extravagantly so—that any dispute arising in this connection is essentially a matter of domestic jurisdiction. Also, practically all disputes involving an allegation of a breach of an international duty, whether under a treaty or under customary international law, arise out of events occurring within the territory of that State. In that sense it may be claimed, with or without good reason, that they are matters essentially within the national jurisdiction of the State. A dispute relating to the jurisdictional immunities of foreign States or their diplomatic agents may be asserted to fall within that category—especially if its subject-matter is covered by national legislation or the jurisprudence of national courts. A defendant State may allege that, for the latter reason, a dispute concerning its domestic legislation affecting the continental shelf or parts of the high seas relates to a matter within its national jurisdiction. The only disputes which, it might appear, are outside that category are territorial disputes. But even that is not certain. In fact it has been suggested that territorial disputes pertain to matters of domestic jurisdiction. In the communication addressed on May 4th, 1955, by the Government of Argentina to the United Kingdom in the matter of disputed sovereignty over certain Antarctic territories one of the reasons adduced in support of the refusal of the former Government to submit the issue to this Court was that the Government of the United Kingdom had, in its acceptance of the Optional Clause, itself excluded from the competence of the Court questions within its exclusive jurisdiction. The contention that a territorial dispute involves a matter within the domestic jurisdiction of a State may be farfetched, but has the Court been given the power to say that any such assertion is obviously in bad faith, that it constitutes an abuse of a right, that it must be ignored or overridden, and that the Court has jurisdiction notwithstanding the determination to the contrary by the State in question?

Any attempt to embark upon the examination of the question whether a Government has acted in bad faith in determining that a matter is essentially within its domestic jurisdiction may involve an exacting enquiry into the merits of the dispute—an enquiry so exacting that it could claim to determine, with full assurance, that the juridical view advanced by a Government is so demonstrably and palpably wrong and so arbitrary as to amount to an assertion made in bad faith. Only an enquiry into the merits can determine that although an assertion made by the defendant Government is not legally well-founded it is nevertheless reasonable; or that although it is not reasonable, it is not wholly arbitrary. The Court has no power to make such determination.

The "automatic reservation" is couched in terms so comprehensive as to preclude the Court from reviewing it or interpreting it

away not only by reference to any assertion of abuse of a right by the defendant State but also in any other way. Thus, for instance, it is not open to the Court to disregard that reservation by reference to some such argument as that the right of exclusive determination pertains only to matters which are "essentially within domestic jurisdiction"; that a matter which is clearly governed by international law, because of international custom or treaty, is not essentially within the domestic jurisdiction of a State; and that, therefore, such matters are neither within the scope of the reservation nor within the power of the accepting State to determine unilaterally whether the dispute is within the domestic jurisdiction. It is not easy to find a legal limit to the right of the accepting State which has appended a reservation of this kind to decline the jurisdiction of the Court. That right seems to be unqualified. So is the inability of the Court to review the attitude of the Government in question. That very absence of qualification is expressive of the absence of any element of legal obligation implicit in a reservation thus formulated.

Having regard to the preceding observations I am of the view that the right of the accepting State to determine whether a matter is essentially within its domestic jurisdiction makes the extent and the very existence of its obligation dependent upon its will; that the subject-matter of such determination may cover practically all disputes; that the Court has no power to disregard a determination thus made on the ground that it has not been made in good faith or an any other ground; and that the reservation of domestic jurisdiction thus formulated is therefore invalid inasmuch as it deprives the Acceptance of the essential element of legal obligation.

3. *Can the "automatic reservation" be separated from the Acceptance as such ?*

I have come to the conclusion that the "automatic reservation" relating to matters deemed by the Government of France to be essentially within her national jurisdiction is invalid for the double reason that it is contrary to the Statute of the Court and that it deprives the Acceptance of the indispensable element of legal obligation.

If the clause of the Acceptance reserving to the declaring Government the right of unilateral determination is invalid, then there are only two alternatives open to the Court: it may either treat as invalid that particular part of the reservation or it may consider the entire Acceptance to be tainted with invalidity. (There is a third possibility—which has only to be mentioned in order to be dismissed—namely, that the clause in question invalidates not the Acceptance as a whole but the particular reservation. This would mean that the entire reservation of matters of national jurisdiction

would be treated as invalid while the Declaration of Acceptance as such would be treated as fully in force.)

As stated, the first possibility is that the particular condition attached to the reservation—namely, the words "as understood by the French Government"—should be treated as non-existent and ignored while the remainder of the reservation and of the Acceptance as a whole be treated as fully valid and subsistent. Legal practice and doctrine within the State are familiar with situations in which a contract or any other legal instrument contains a clause which the law treats as invalid or unenforceable without necessarily bringing about the nullity of the contract or instrument as a whole. In those cases the provision in question is severed—is treated separately—from the rest of the text. This is not always possible. Much depends on whether that provision is an essential part of the instrument in question. In the international sphere the problem of severance of provisions of treaties and other international instruments has been frequently discussed by writers and occasionally in judicial decisions—in particular in connection with the question of termination of treaties on the ground of non-performance by one of the parties or as the result of war or some other change of circumstances. Early writers considered that every single provision of a treaty is indissolubly linked with the fate of the entire instrument which, in their view, lapses as the result of the frustration or non-fulfilment of any particular provision, however unimportant and non-essential. This is not the modern view. Neither is it the view which has secured the adherence of modern governmental and judicial practice, including that of the Permanent Court of International Justice. The latter on a number of occasions declined to treat individual provisions of a treaty as being indissolubly connected and interdependent. (See, for instance, *Free Zones* case, Series A/B, No. 46, p. 140, in which the Court treated Article 435 of the Treaty of Versailles as a "complete whole" independent of the rest of the Treaty; and the Advisory Opinions relating to the competence of the International Labour Organisation, Series B, No. 2, pp. 23, 24, and Series B, No. 13, p. 18, with regard to the independent position of Part XIII of the Treaty.) In a different sphere, the Opinion of this Court in the case of the *Reservations to the Genocide Convention* shows that there may be reasonable limits to the notion of the indivisibility of a treaty and that some of its provisions may not be of a nature essential to the treaty as a whole.

International practice on the subject is not sufficiently abundant to permit a confident attempt at generalization and some help may justifiably be sought in applicable general principles of law as developed in municipal law. That general principle of law is that it is legitimate—and perhaps obligatory—to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties

and the nature of the instrument the condition in question does not constitute an essential part of the instrument. *Utile non debet per inutile vitiari.* The same applies also to provisions and reservations relating to the jurisdiction of the Court. It would be consistent with the previous practice of the Court that it should, if only possible, uphold its jurisdiction when such a course is compatible with the intention of the parties and that it should not allow its jurisdiction to be defeated as the result of remediable defects of expression which are not of an essential character. If that principle were applied to the case now before the Court this would mean that, while the French acceptance as a whole would remain valid, the limitation expressed in the words "as understood by the Government of the French Republic" would be treated as invalid and non-existent with the further result that Norway could not rely on it. The outcome of the interpretation thus adopted would be somewhat startling inasmuch as it would, in the present case, favour the very State which originally made that reservation and defeat the objection of the defendant State—an aspect of the question commented upon in another part of this Opinion. That fact need not necessarily be a decisive reason against the adoption of any such interpretation.

However, I consider that it is not open to the Court in the present case to sever the invalid condition from the Acceptance as a whole. For the principle of severance applies only to provisions and conditions which are not of the essence of the undertaking. Now an examination of the history of this particular form of the reservation of national jurisdiction shows that the unilateral right of determining whether the dispute is essentially within domestic jurisdiction has been regarded by the declaring State as one of the crucial limitations—perhaps the crucial limitation—of the obligation undertaken by the acceptance of the Optional Clause of Article 36 of the Statute. As is well known, that particular limitation is, substantially, a repetition of the formula adopted, after considerable discussion, by the Senate of the United States of America in giving its consent and advice to the acceptance, in 1946, of the Optional Clause by that country. That instrument is not before the Court and it would not be proper for me to comment upon it except to the extent of noting that the reservation in question was included therein having regard to the decisive importance attached to it and notwithstanding the doubts, expressed in various quarters, as to its consistency with the Statute. It will also be noted that some governments, such as those of India and the Union of South Africa, have attributed so much importance to that particular formulation of the reservation that they cancelled their previous acceptance of the Optional Clause in order to insert, in a substituted Declaration of Acceptance, a clause reserving for themselves the right of unilateral determination. To ignore that clause and to maintain the

binding force of the Declaration as a whole would be to ignore an essential and deliberate condition of the Acceptance.

From the point of view of the Government concerned there were weighty reasons why, anxious to frame its acceptance of the Optional Clause and its reservations thereto in such a manner as to preserve full freedom of national decision in the matter of submission of future disputes to the Court, it attached importance to formulating this particular reservation. In a significant passage, cited in paragraph 25 of the Preliminary Objections of Norway, the Rapporteur of the Committee for Foreign Affairs of the French Chamber said in relation to the reservation in question: "The French sovereingty is not put in issue and its rights are safeguarded in all spheres and in all circumstances." In fact, as is suggested in another part of this Opinion, there are only few disputes which cannot, without giving rise to an irrefutable imputation of bad faith, be brought within the orbit of the assertion that they pertain to a matter essentially within the domestic jurisdiction of the State concerned. Similarly, as already stated, there is but little substance in the view that the freedom of determination by the State interested is effectively limited for the reason that it must be exercised in good faith and that the Court is the judge whether it has been so exercised. The Court is therefore confronted with the decisive fact that the Government in question was not prepared to subscribe or to renew its commitment of compulsory judicial settlement unless it safeguarded in that particular way its freedom of action. That particular formulation of the reservation is an essential condition of the Acceptance as a whole. It is not severable from it. The phrase "as understood by the Government of the French Republic" must be regarded as being of the very essence of the undertaking in question. It is not a collateral condition which can be separated, ignored and left on one side while all others are given effect. The Acceptance stands and falls with that particular reservation and that particular formulation of the reservation. Without these words the Government which made that reservation would not have been willing to accept the commitments of the compulsory jurisdiction of this Court.

The Court cannot properly uphold the validity of the Acceptance as a whole and at the same time treat as non-existent any such far-reaching, articulate and deliberate limitation of its jurisdiction. To do so would run counter to the established practice of the Court—which, in turn, is in accordance with a fundamental principle of international judicial settlement—that the Court will not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt. The Court certainly cannot assume jurisdiction if there is a clearly expressed intention to deny it in specified circumstances. This means that it would not be possible for the Court to disregard that part of the reservation in question which claims for the State concerned the right to determine its

application. It is not possible for the Court to do otherwise than to regard this particular part of the reservation, so specifically formulated, as constituting an essential and not severable part of the instrument of acceptance. It might perhaps be possible—I express no view on the subject—to disregard and to treat as invalid some other reservation which is contrary to the Statute and thus to maintain the Acceptance as a whole. This is not possible with regard to a reservation directly referring to and excluding the jurisdiction of the Court. On the other hand, as I pointed out, it is not possible for the Court to act affirmatively upon that part of the reservation seeing that it is contrary to the Statute. It is thus not possible for the Court, while upholding the validity of the Acceptance, either to act upon that part of the reservation or to ignore it. The inescapable solution of the dilemma is to treat the entire Acceptance as invalid.

* * *

This being so, my conclusion on this aspect of the question is that the reservation of national jurisdiction as qualified by the French Government is an essential part of its acceptance of the obligations of the Optional Clause; that it cannot be severed from the Acceptance as a whole; that as it is contrary to the Statute of the Court and as it deprives the Acceptance of the requisite element of legal obligation it must be held to be invalid and to invalidate the Acceptance as a whole; and that, there being no valid Acceptance, there is no instrument upon which France can rely and which, in the absence of agreement of Norway to submit to the jurisdiction of the Court apart from the Optional Clause, can provide a basis for the jurisdiction of the Court.

* * *

It is necessary in this connection to refer to the Judgment of the Court in the case concerning *Rights of Nationals of the United States of America in Morocco*. In that case, brought before it by an application based on Article 36 (2) of the Statute, the Court exercised jurisdiction although the Acceptances both of the applicant and the defendant State contained the "automatic reservation". To what extent is the Court now bound by the fact that it assumed jurisdiction in that case? Upon investigation that case proves irrelevant for the present issue.

In the first instance, in the case of the *Rights of Nationals of the United States in Morocco* the jurisdiction of the Court was not challenged by the defendant State; the latter did not invoke the "automatic reservation". There was, therefore, no direct occasion for the Court to embark upon an examination of the validity of that reservation and of the Acceptance as a whole.

Secondly, although in that case France relied in her Application upon the Optional Clause of Article 36 (2) of the Statute, the jurisdiction of the Court was in fact exercised not on the basis of the Optional Clause but on the principle of *forum prorogatum*, i.e. on what was actually a voluntary submission independent of the source of jurisdiction originally invoked by the applicant party. The Government of the United States agreed to the jurisdiction of the Court without admitting that the Court was competent on the basis of the Optional Clause. The relevant passage of the Counter-Memorial of the United States was as follows: "The United States Government does not raise any jurisdictional issue in the proceeding, even though it does not concur in the allegations with respect to the compulsory jurisdiction of the Court which have been presented by the French Government, it being its understanding that its abstaining from raising the issue does not affect its legal right to rely in any future case on its reservations contained in its acceptance of the compulsory jurisdiction of the Court." (*Case concerning Rights of Nationals of the United States of America in Morocco:* Pleadings, Oral Arguments, Documents, vol. i, p. 262.) This statement is of significance seeing that in the course of the written proceedings the Government of the United States of America withdrew its Preliminary Objection which it had raised on account of the insufficient clarification of the identity of the Parties. That Objection was withdrawn as soon as it became clear that both France and Morocco would be bound by the Judgment of the Court (*ibid.*, vol. ii, pp. 424-434). It is thus clear that in that case the Court exercised jurisdiction not only because—unlike in the present case—the defendant Party agreed to it but also because it agreed to it on the basis other than the Declaration of Acceptance. The dispute now before the Court is the first case—an entirely novel case—in which a Party has claimed the right, denied to it by Article 36 (6) of the Statute, to substitute itself for the Court in the matter of a decision as to its jurisdiction. This being so, I need not discuss the question as to the extent to which the Court would be bound by the precedent of the case of the *United States Nationals in Morocco*, if that case were relevant to the issue now before the Court.

* * *

It is essential to examine the view that it is not open to the Court to treat the French Acceptance as invalid seeing that Norway has not put forward any such assertion and that by relying, in view of the principle of reciprocity, on the French reservation she implicitly recognized the validity of the French Acceptance. I am unable to agree with that view. It would be open to Norway, by consenting to the jurisdiction of the Court irrespective of the French Acceptance, to confer competence upon the Court by way

of *forum prorogatum*. However, Norway has not submitted to the jurisdiction of the Court in any way. She has challenged it on various grounds. This being so, the fact that she has not raised the particular issue of the validity of the French Acceptance as a whole cannot endow with validity an instrument otherwise invalid. Even if Norway had agreed to the jurisdiction of the Court, it would not have followed that the Court could have exercised it on the basis of the French Declaration of Acceptance. The defendant State cannot, by refraining from raising objections, grant dispensation from invalidity. No one can do it—including, perhaps, the Court itself. The Court must have before it as a basis of its jurisdiction a valid text. It must ascertain the existence of that text. In the past it has, when occasion arose, raised the question of its jurisdiction *proprio motu* (see e.g. the case of the *Administration of the Prince von Pless*, Series A/B, No. 52, p. 15). It is open to the Court, for that purpose, to ascertain the views of the parties on the subject by availing itself of the useful provision of its Rules which enable it to address questions to the parties at any stage of the oral proceedings.

As stated, the invalidity is inherent in the Declaration of Acceptance formulated in that way. It is not the case that the Declaration is valid until an occasion arises in which that particular reservation is relied upon by one party and challenged by the other with the result that its inconsistency with the Statute is thus brought to light. The Declaration is invalid *ab initio*. Brief reflection shows the irrelevance of the fact that neither party has challenged the validity of the Declaration and that the Court must therefore act upon it. For, clearly, the State which has formulated the "automatic reservation" is not likely, or entitled, to question it. The respondent State which relies upon it—by virtue of reciprocity (as Norway has done in the present case)—is not interested in challenging its validity. It finds it an effective, though possibly somewhat embarrassing, weapon of defence—in some cases the only effective means of defence unless it decides to steer the uncertain course of invoking simultaneously and by way of alternative submissions both the invalidity of the reservation and the reservation itself. For these reasons no importance can reasonably be attached to the fact that the validity of the "automatic reservation" has not been challenged by either party. Seeing that one party is responsible for its inclusion in its Declaration of Acceptance and that the other Party finds it necessary or imperative to rely on it, I can see but little force in the argument pointing to the fact that the validity of that reservation has not been put in issue by either party.

* * *

Reference must be made in this connection to the argument pointing to the existence of certain treaties of obligatory arbitration

concluded in the past which, expressly or by implication, conferred upon the signatories the right to determine the arbitrability of a particular dispute. The arbitration treaties which were concluded before the First World War and which contained the then customary reservations of national honour and independence were generally regarded as recognizing by implication such right of unilateral determination. In some cases that right was expressly reserved. That argument is, in any case, irrelevant seeing that those treaties were not subject to the limitation of Article 36 (6) of the Statute of the Court. Were they valid from the point of view of the question whether they contained effective legal obligations? The question is, once more, of an academic character seeing that these treaties were not concluded within the framework of any organic statute of a tribunal possessing jurisdiction to determine their validity. They were devoid of an element of effective legal obligation. They provided a basis for a *compromis* if the parties so wished. They were never applied against the will of the defendant State. While it may thus be pedantic to enquire into the legal validity of the treaties in question in circumstances wholly different from the problem now before the Court, their practical insignificance does not seem to be open to doubt. With isolated exceptions, they were concluded at a time when a system of obligatory arbitration existed in name only.

Above all, treaties of obligatory judicial settlement providing for the right of unilateral determination of the jurisdiction of the tribunal virtually disappeared after the First World War following upon the establishment of the Permanent Court of International Justice. In practically all—and certainly the principal—treaties of arbitration and judicial settlement concluded after the First World War the right to determine the disputed jurisdiction of the tribunal was conferred upon the tribunal itself (as, e.g., in the Swiss-German Treaty of 3 December, 1921, Article 4; or in the various Locarno Arbitration Treaties of 16 October, 1925—e.g., Article 16 of the Treaty between Germany and Poland). The important multilateral treaties of obligatory judicial settlement concluded after the First and Second World Wars include specific provisions to that effect—as does, for instance, Article 41 of the General Act for the Pacific Settlement of International Disputes of 26 September 1928 and the Pact of Bogotá of 30 April 1948. Article V of the latter treaty provides as follows: "The aforesaid procedures may not be applied to matters which, by their nature, are within the domestic jurisdiction of the State. If the parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of any of the parties." Article 38 of the most recent multilateral treaty of obligatory judicial settlement—the European Convention of 29 April 1957 for the Peaceful Settlement of Disputes—is to the same effect. An examination of over two hundred treaties in the volume published

in 1949 by the United Nations and entitled "Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948", reveals that only a very small number of treaties—perhaps not more than six—contain a reservation of the right of unilateral determination. The express acknowledgment of the power of the Court to determine its jurisdiction in cases in which that jurisdiction is disputed has thus become, even apart from the Statute of the Court, a uniform feature of the practice of States. The "automatic reservation", should it continue to be applied by the Court directly or indirectly, will arrest or reverse that trend which is an essential condition of any true system of obligatory judicial settlement.

* * *

I must now consider some of the implications of a decision of the Court holding that a Declaration of Acceptance which includes the "automatic reservation" is invalid. Any such decision has a bearing upon Declarations, similarly formulated, of a number of other States. These now include the United States of America, Mexico, Pakistan, India, South Africa, Liberia, and, perhaps, to some limited extent the United Kingdom of Great Britain and Northern Ireland. The latter, in a Declaration made on 18 April, 1957, excluded from the Acceptance any question "which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or of any of its dependent territories". I am conscious of some apprehended consequences of a decision of the Court holding that the manner in which the Optional Clause has been accepted by an increasing number of States, traditionally wedded to the cause of international judicial settlement, has the effect of rendering their Acceptance invalid. Moreover, that form of accepting the jurisdiction of the Court has not been confined to the Optional Clause. It has been followed, under its influence, in some other texts purporting to provide for the obligatory jurisdiction of the Court. (See, e.g., the reservation of the United States of America to the Pact of Bogotá: *Year Book of the Court*, 1947-1948, p. 144, n. 2. In a series of agreements relating to economic aid and concluded between the United States of America and some other States—as, for instance, with China on 3 July 1948—the following provision occurs: "It is understood that the undertaking of each Government [providing for the jurisdiction of the Court] ... is limited by the terms and conditions of such effective recognition as it has heretofore given to the compulsory jurisdiction of the International Court of Justice under Article 36 of the Statute of the Court": *ibid.*, 1948-1949, pp. 152-155.)

The circumstance that a decision of the Court may affect Governments which have had no opportunity to express their view on the

subject is a cause of concern. It would have been preferable if, in accordance with Article 63 of the Statute, the Governments which have made a Declaration in these terms had been given an opportunity to intervene. Failing that, it is possible for those Governments to adopt the attitude that, in accordance with Article 59 of the Statute, the authority of the decision of the Court is limited to the present case and that they are at liberty to assert their attitude on the matter on another occasion.

In so far as it is within the province of the Court to consider the purpose of the system of the Optional Clause as provided in Article 36 (2) of its Statute, it is bound to attach importance to the fact that the "automatic reservation" has tended to impair the legal—and moral—authority and reality of the Optional Clause. Through the operation of reciprocity the practice of illusory acceptances must in the end encompass most declaring Governments including, as in the present case, those which accepted the Optional Clause without reservations.

It might be said that to look in that way upon a Declaration of Acceptance thus formulated is to underestimate its moral value and to disregard the fact that enlightened Governments are not likely to invoke the reservation in question lightly and abusively. Yet, to stress the moral value of the Declaration is to go some way in admitting that it is devoid of legal force. Moreover, there is little substance in the assumption that Governments exhibit reluctance to invoke reservations to their acceptance of the jurisdiction of international tribunals or that any moral impropriety attaches to reservations being invoked. It is a good legal right of Governments to do so. It is seldom that a Government cited before the Court in pursuance of a unilateral application has admitted the jurisdiction of the Court as following from the instrument invoked by the applicant State. In the present case, Norway, which has accepted the Optional Clause without any reservations, save that of reciprocity, has not abandoned the right of unilateral determination which accrues to her by virtue of the French form of acceptance.

It is difficult to attach importance to the suggestion that an Acceptance containing the "automatic reservation" is not wholly devoid of legal value seeing that it may at least provide a basis for the acceptance of the jurisdiction of the Court by way of voluntary submission through the operation of the principle of *forum prorogatum*. No such basis is required for that purpose. A unilateral application altogether unrelated to any previous acceptance of the jurisdiction of the Court is sufficient for that purpose provided that the defendant State is willing to submit to the jurisdiction of the Court.

If in law an Acceptance of that nature does not constitute a text embodying legal obligations then the decision of the Court in that sense does no more than register a fact; it provides an

opportunity for any Government so minded to put right a faulty Declaration of Acceptance; and it assists in arresting a tendency which threatens to disintegrate that minimum of compromise which is embodied in the Optional Clause. It is not suggested that the Court should be guided by a desire to achieve these objects—however important they may be for the integrity of international undertakings and the cause of international justice. Neither is it within the province of the Court to assess the propriety of a practice according to which a State, while in fact retaining freedom of action on the matter of submission of disputes to the Court, gains the moral and political advantages associated with professed adherence to the principle of obligatory judicial settlement. What the Court must do is to apply the legal principles governing the matter. It has been said that as States are not at all bound to accept the jurisdiction of the Court and as their Acceptance is in the nature of a voluntary sacrifice, it is not fitting to examine it too closely. The Court cannot be concerned with considerations of this nature. It cannot weigh the niceties of political advantage. For it may be argued that, if as the result of such Acceptance States gain in prestige and reputation while in fact not surrendering their freedom of decision, the nature of the sacrifice is not obvious. Also, while the Government making the "automatic reservations" retains freedom of action, it throws upon the defendant State, which has not appended any such reservation, the difficult and often embarrassing responsibility of invoking what, in the eyes of some, may be an odious and peremptory reservation. The present case has shown the implications of the resulting situation.

If the Court could legitimately be concerned with issues transcending that immediately before it, it might be considered its duty to discourage, in so far as it lies with it, the progressive disintegration of the institution of the Optional Clause as evidenced, *inter alia*, by the tendency to adopt reservations such as that here examined. Governments are under no compulsion, legal or moral, to accept the duties of obligatory judicial settlement. When accepting them, they can limit them to the barest minimum. But the existence of that minimum, if it is to be a legal obligation, must be subject to determination by the Court itself and not by the Government accepting it. A purported obligation, however apparently comprehensive, which leaves it to the will of the State to determine the very existence of the obligation, cannot be the basis of an instrument claimed to found the jurisdiction of the Court. That view seems to be drastic and startling only if it is assumed that principles of law which generally apply in respect of the validity of texts purporting to create a legal obligation do not apply in the case of Governments. Any such assumption is inconsistent with the function of a Court of Justice.

For the latter reason, the problem involved is of even wider import than the question of the jurisdiction of the Court. It raises an issue which is of vital significance for the preservation of its judicial character. That issue is whether it can be part of the duty of the Court to administer and to give the status of a legal text to instruments which in fact do not create legal rights and duties. The judicial character of the Court may become endangered if it were to assume the task of interpreting and applying texts which, being devoid of the element of effective legal obligation, are essentially no more than a declaration of political purpose. Such danger may be inherent in any readiness to elevate to the merit of a legal commitment what is no more than a non-committal declaration of intention to be implemented at the option of the Government concerned.

* * *

My conclusion is therefore that, having regard to the reservation relating to matters which are essentially within domestic jurisdiction as understood by the French Republic, the French Declaration of Acceptance is invalid for the reason:

(1) That it is contrary to the Statute of the Court;
(2) That it is incapable of giving rise to a legal obligation inasmuch as it claims, and effectively secures, the right of unilateral determination of the extent and of the existence of the obligation of judicial settlement with regard to a comprehensive and indefinite category of disputes covering potentially most disputes which may come before the Court;
(3) That the particular qualification of the reservation in question forms an essential part of the Acceptance and that it is not possible to treat it as invalid and at the same time to maintain the validity of the reservation to which it is attached or of the Acceptance as a whole.

Accordingly, in my view the entire French Declaration of Acceptance must be treated as devoid of legal effect and as incapable of providing a basis for the jurisdiction of the Court. It is for that reason that, in my view, the Court has no jurisdiction over the dispute. The majority of the Court has reached the same result by acting upon the "automatic reservation" and the French Declaration of Acceptance—both of which I consider to be invalid. However, as the Court has expressly stated that, having regard to the circumstances before it, its Judgment does not pre-judge the major issue involved, I feel that a Separate Opinion—as distinguished from a Dissenting Opinion—meets the requirement of the case.

(Signed) HERSCH LAUTERPACHT.