DISSENTING OPINION OF JUDGE LEVI CARNEIRO

[Translation]

1. The first question which the Court ought, logically, to consider is the request for the joinder of the Objection to the merits, which was strongly urged by counsel for the United Kingdom.

The Court has not granted the request, and I agree with that decision. However, as I have already pointed out in the Ambatielos case (Greece *v.* United Kingdom), I think it is necessary, in determining the Court's jurisdiction in the present case, to examine certain questions, or certain facts, which may be related to the merits and which are not disputed.

Such a summary appraisal of these questions—without considering them in detail or prejudging them—is sometimes necessary in order to decide the preliminary question.

In the present case, this necessity is more than ever imposed on us by the very nature of the questions that have already been raised, in particular by the multiplicity of "grounds for lack of jurisdiction". I shall have something to say, later on, about the invocation of "general principles of ordinary international law" and about the scope of that question, which must now be considered and which is linked with the merits of the case.

In its Judgment on the Objection to its jurisdiction in the case concerning Polish Upper Silesia, the Permanent Court declared that it would consider certain questions

> "even if this enquiry involves touching upon subjects belonging to the merits of the case ; it is, however, to be clearly understood that nothing which the Court says in the present Judgment can be regarded as restricting its entire freedom to estimate the value of any arguments advanced by either side on the same subjects during the proceedings on the merits".

Nobody could have described with greater accuracy than was done by counsel for the Government of Iran, in the present case, the rules governing the exercise of this right. He said very truly that : "The Court may consider, in its examination of the Preliminary Objection, such elements of the merits as are necessary therefor" ; and that this examination "will no doubt be preferably directed to elements of the merits which are not in dispute" ; their selection, he added, is a "question of restraint, prudence and the proper administration of justice, for it is not possible to have watertight compartments for preliminary objections and the merits". (Oral arguments, Distr. 52/131 *bis*, p. 13.)

In the present case, the Parties were obliged, owing to the interlocking character of the questions, to make use of arguments which might, in theory, be regarded as outside the scope of the Objection

to the jurisdiction. A decision on the Objection could not be arrived at in any other way.

2. Here another preliminary observation is called for. Emphasis has been laid, with a view to excluding any action by the Court, on the strictly private character of the present dispute : it is concerned with a Concession Agreement between the Government of Iran and a British company.

But it is rather the case that this contract—which the British Government in its Memorial even sought to regard as a sort of international treaty—possesses very considerable interest from an international standpoint ; it may be said that it is of international significance.

I accept the argument of the Iranian Government that this Concession Agreement was neither framed nor approved by the League of Nations or by its Council in 1933. It is, however, the fact that the dispute between the Iranian Government and the British Government in regard to the revocation of the earlier Concession Agreement was brought to the knowledge of the League of Nations, and that the latter manifested an interest in the preparation of the present contract.

I also admit that, according to statements made by members of the British Government in Parliament, which were brought to the knowledge of the Court by the Iranian "Observations préliminaires" (pp. 33-34), that Government owns a majority of the shares of the Anglo-Iranian Oil Company, and this fact was known to the Iranian Government.

From another point of view, it is common knowledge that, now more than ever, all questions connected with the extraction of oil provoke certain international reactions, which are all the more pronounced in the case of a country having a geographical situation such as that of Iran.

In Article 22 of the Concession Agreement of 1933, it was laid down that if the arbitrators appointed by the parties were unable to agree, an umpire was to be nominated by the President or the Vice-President of the Permanent Court. The two Governments—British and Iranian—communicated this provision to the Registrar of the Court (Oral arguments, p. 103).

Lastly, the Iranian Government laid stress in its statements on the significance of the contract of 1933 as an expression of the political domination exercised by the United Kingdom over Iran, and it described the movement for the nationalization of the oil industry, *i.e. the revocation of that contract*, as a "national liberation". I shall show later on, that measures for nationalization are often of considerable international interest.

In view of all these circumstances, I do not believe that the Concession Agreement of 1933 can be regarded simply as a private

convention, or that the act by which it was cancelled can be regarded as a purely private matter.

It is true that Article 36, paragraph 2, sub-paragraph *(a)*, of the Statute, only refers to "the interpretation of a treaty", though it ought to have said "the interpretation of any international engagement"—which would be more in consonance with the wide terms of sub-paragraph *(b)* which reads: "any question of international law". The wording which I would prefer seems all the more justified when it is borne in mind that sub-paragraph *(c)* of the same article 36, paragraph 2, speaks of "the existence of any fact which, if established, would constitute a breach of an international obligation", and that sub-paragraph *(d)* speaks of: "the nature or extent of the reparation to be made for the breach of an international obligation". If the Court can have jurisdiction in regard to the consequences of an international engagement, how can it be argued that its jurisdiction cannot extend to the interpretation of all international engagements, or that it must in all cases be limited to the interpretation of treaties?

And if the purpose of the Court's intervention is the legal solution of international disputes, how can such intervention be excluded in a case which threatens international peace, simply because there is no question of the interpretation of an inter-state treaty?

Since the Iranian declaration recognizes the compulsory jurisdiction of the Court for disputes "with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia", we might regard the jurisdiction as having been accepted, in the cases referred to, with regard to all "conventions", provided that they have an international significance—even if they have not been signed by the representatives of the two Governments. The contract of the Anglo-Iranian Company might be regarded as a "convention" of an international scope—even though it is not itself international—and the dispute that has arisen would then fall within the Court's jurisdiction.

Such an interpretation of Iran's declaration might, however, result in giving it a scope wider than that of the jurisdiction of the Court, which is limited by Article 36, paragraph 2; that is to say, the jurisdiction would be extended to the interpretation of any "international engagement"; this I would regard as desirable, but it is not yet a fact. As the Concession Agreement of 1933 is not a treaty, it follows that the dispute in regard to its execution does not constitute a ground for the Court's jurisdiction. However, I have thought it useful to draw attention to this point because I hope that the Court's jurisdiction will evolve in the direction indicated, by decisions or by legislation. These considerations ought even now to influence the evolution of the Court's jurisprudence.

3. As it is admitted that the Court's jurisdiction results from the agreement of States, it becomes necessary to determine in what

manner Iran accepted that jurisdiction. The scope of the Persian Government's Declaration of October 2nd, 1930, ratified on September 19th, 1932, has been the subject of lengthy arguments.

On behalf of the Iranian Government, it has been contended that the words *"et postérieurs à la ratification de cette déclaration"* relate to *"traités ou conventions"*. In that case, only disputes arising in regard to situations or facts relating to the application of treaties subsequent to September 19th, 1932, would come within the jurisdiction of the Court.

On behalf of the British Government, it was argued that the words *"et postérieurs à la ratification"* relate to *"situations ou faits"*. According to that interpretation, the Court would have jurisdiction for all disputes, subsequent to the ratification of the Declaration, relating to situations or facts, which were also subsequent to that ratification, in regard to the application of treaties, of whatever date, accepted by Persia.

Even from a grammatical point of view, reasons were advanced in favour of each of these two conflicting interpretations. True, in the present case, historical and political considerations should be allowed greater weight than points of grammatical interpretation. All the more so because the document in question was perhaps drafted by a person who was not entirely familiar with the niceties of the French language. But it is also true that a number of historical and political arguments were presented in support of each of the respective interpretations.

From the point of view of international law, the Iranian Government contended that the limitations set forth in the Declaration should not be construed restrictively, because they are matters within the sphere of national sovereignty.

I regard as more relevant than that argument another which might have been employed against it : namely, that limitations on the terms of Article 36 of the Statute are not authorized—and are even excluded—by that provision of the Statute. In point of fact, Article 36, paragraph 2, allows States to declare that they accept the Court's jurisdiction "in *all* legal disputes, concerning" the subjects indicated in sub-paragraphs *(a), (b), (c), (d)*.

The jurisdiction cannot be accepted subject to the exclusion of one or more of these categories. Paragraph 3 of Article 36 of the Statute specifies the only conditions which States may impose, viz., that of reciprocity on the part of one or more States, and of a limitation in time.

In my opinion, it is impossible to allow any other restrictions or conditions. However, it is a fact that, in practice, other restrictions to Article 36 have been admitted, in the declarations made by different nations. Thus undue facility has been afforded for accepting the Court's jurisdiction—subject to restrictions which make it doubtful or open to challenge. The Court cannot ensure the

observance of the Statute if it rejects acceptances of its jurisdiction subject to conditions which are not authorized by the Statute. The Persian declaration is itself a good example of the latitude which has been allowed, because it is strictly confined to treaties "accepted by Persia"—a subjective condition which it is very difficult to appraise. Thus, the Court finds its action delayed and restricted by the terms of these clauses, and by the controversies which they engender as to the extent of its jurisdiction.

4. I have sought to ascertain whether the Court's jurisdiction may not rest on some other basis which would avoid the controversy regarding the interpretation of the Iranian declaration ; in other words, whether—even if one accepts the Iranian interpretation according to which the Court's jurisdiction is limited to disputes arising from treaties subsequent to September 19th, 1932—there is not some other foundation for its jurisdiction in the present case.

I have refrained from construing the Iranian declaration or determining the scope of the exchange of notes of 1928. Even among the treaties signed by Persia between 1929 and 1937, which are invoked by the British Government, I confined my attention to those which are "subsequent to the ratification of the declaration", in other words, subsequent to September 19th, 1932. That description covers the treaties concluded by Persia with Denmark on February 20th, 1934, with Switzerland on April 25th, 1934, and with Turkey on March 14th, 1937.

Another instrument which is subsequent to the ratification of the Iranian declaration is the Concession Agreement of April 29th, 1933. As I have already observed (paragraph 2), I do not regard it as a treaty, in spite of the circumstances referred to above.

5. As a result, I have been able to reduce the controversy to narrow limits : I will admit, *argumentandi gratia,* that the Iranian declaration only accepts the jurisdiction of the Court in respect of treaties subsequent to September 19th, 1932. It is therefore necessary to consider whether the treaties with Denmark, Switzerland and Turkey comply with that condition and are applicable to British nationals, and also whether the British Government has reasonable ground for complaining of a breach of the Persian Government's obligation in regard to the treatment of British nationals.

6. When reduced to these terms, the question becomes simplified and acquires an added importance, as it involves a doctrinal issue of the highest significance. It does not merely raise the issue whether the Court has, or has not, jurisdiction in the present case. It seeks to determine the rôle of the Court as the guardian of the

principles of international law and of the international organization—perhaps even to justify its existence.

7. In the Treaty of March 4th, 1857, between Persia and the United Kingdom, it was provided, in Article IX, that

> "the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation".

In the Treaty of February 9th, 1903, the two Governments agreed (Article II) that the subjects of both countries and their imports into each other's territories

> "shall continue to enjoy under all conditions most-favoured-nation treatment".

It is interesting to note that in the text of the latter treaty, as published in the Felix Stoerk collection (*Nouveau Recueil général de traités*, 2nd Series, Vol. XXXI, p. 506), the words relating to "subjects" which appear in the official publications (*British and Foreign State Papers*, Vol. XCVI, p. 51 ; *Treaty Series* No. 10) are omitted.

Subsequently, in a number of treaties—28 XI 1928, 17 II 1929, 9 V 1929, 29 X 1930, 20 II 1934, 25 IV 1934, and 14 III 1937—Iran undertook to grant to the nationals of Egypt, Germany, Belgium, Czechoslovakia, Denmark and Switzerland, and by exchanges of notes at different dates, to the nationals of Turkey, the United States, the Netherlands and Italy, treatment in accordance "with the principles and practice of ordinary international law", "as regards their persons and their property".

The United Kingdom Government contends that this guarantee is extended to British nationals, in virtue of these treaties and of the most-favoured-nation clause, and that the behaviour of the Iranian Government towards the British "Anglo-Iranian Oil Company", which gave rise to the dispute which is the subject of the Application, constitutes a breach of general international law.

It appears to me that, in these circumstances, the dispute comes within the terms of the Iranian Declaration accepting the Court's jurisdiction—even if one admits the interpretation now placed upon it by the Iranian Government. The three treaties—with Denmark, Turkey and Switzerland—which guarantee the observance of international law—were signed in the years 1934 and 1937, that is, subsequently to the ratification of the Iranian declaration.

8. In spite of the clarity of this conclusion, several weighty objections to it have been put forward. Some of these objections have been abandoned, but this fact, together with the multiplicity of the objections, is striking evidence of the persistence of the efforts to weaken the conclusion submitted.

In the course of the oral arguments, two objections were put forward. It was contended that the duty of conforming to general international law in the treatment of British nationals did not arise from the Treaties of 1934 and 1937, but from much earlier treaties—the Treaties of 1857 and 1903—which contained the most-favoured-nation clause : the latter Treaties were said to be the principals, the others only accessories. It was further contended that the Act nationalizing the exploitation of oil did not contravene any rule of general international law ; in other words, that the Government of Iran, though bound to accord the guarantees of general international law to the British nationals, was not debarred from nationalizing the exploitation of oil, in regard to which it had concluded a contract in 1933 with a British company.

I am unable to accept either of these two objections.

9. As to the first objection, it seems to me to be clear that British nationals received from Iran a guarantee of "the principles and practice of ordinary international law", not by virtue of the old Treaties of 1857 and 1903 which preceded the Iranian Declaration, but as the result of the Treaties of 1934 and 1937, which were subsequent to the Declaration. From this point of view, the principal instruments are the two last treaties, not the two earlier ones. The first two treaties established the most-favoured-nation clause ; but this clause, by itself, would not give British nationals the guarantee of "the principles and practice of international law". This guarantee they received, by virtue of the most-favoured-nation clause contained in the earlier treaties, when the same guarantee was given to the nationals of Denmark, of Turkey and of Switzerland. This clause operated to enlarge, to extend to British nationals, the concessions granted to other foreigners by the Treaties of 1934 and 1937. This enlargement of the scope of the three later Treaties did not take effect, and could not take effect, before the ratification of these Treaties. But these are treaties which are "*postérieurs*", subsequent to the Iranian Declaration. The dispute which arose from the allegation that this guarantee had been violated is thus within the terms of the Declaration, even if one accepts the interpretation put upon it in the present proceedings by the Iranian Government.

The manner in which a most-favoured-nation clause operates is well known. It does not take effect by itself alone ; it operates in due course upon the later treaty which grants some advantage to another nation, and it immediately extends the same advantage to the favoured nation.

The effect of the clause is, therefore, as Visser has said, complementary. (Ito, *La clause de la nation la plus favorisée*, p. 36.) By itself it confers no rights ; it can have no application and remains useless. Rights or advantages granted to a third State do not exist,

either for the benefit of that State itself or for that of the favoured State before they are expressly conceded. Again, the rights or advantages do not subsist for the favoured State if the concession made to another State should be abrogated. (Raphael A. Farra, *Les effets de la clause*, etc., p. 67 ; Josef Ebner, *La clause de la nation*, etc., pp. 149-150 ; Marcel Sibert, *Traités de droit international public*, II, p. 255.) That is, the clause does not have any permanent effect—its effect is merely contingent and is dependent on the continued existence of another treaty the scope of which it enlarges.

Oppenheim considers it a legal rule, "but a legal rule the content of which is uncertain, because dependent upon a future event, namely concessions to be granted to third States". (*La clause de la nation*, etc., p. 26.) The clause is merely a conditional guarantee of a future concession, a promise or an engagement to grant to a State or to its nationals the same advantages as are granted or may be granted to other States and to the nationals of other States.

It can be seen that it was Iran's treaties with Denmark, Turkey and Switzerland, in 1934 and 1937, and not the Treaties of 1857 and 1903 with the United Kingdom, which gave British nationals, in respect of their persons and their property, the guarantee of the general principles of international law. The present dispute relates to the violation of these guarantees, that is to say, it has direct reference to the application of treaties subsequent to the ratification of the Declaration of October 2nd, 1930. For this reason, even accepting the Iranian construction of this Declaration, the present case is within the Court's jurisdiction.

10. Before dealing with the second objection, I should like to indicate the importance of the question which it raises.

In accordance with what I have said, the Court has before it an allegation of a positive breach of the provisions of two treaties subsequent in date to the Iranian Declaration of 1932 ; this allegation would appear *prima facie* to be well founded. This is sufficient to satisfy me that, even adopting the interpretation put by the Iranian Government upon its Declaration of acceptance of the Court's jurisdiction, the Court has jurisdiction in the present case. There has been a breach of the provisions of a treaty in reliance upon which British nationals have invested large sums of money in the territory of Iran, sums which have indeed brought them immense profits, of which they are now dispossessed without any immediate compensation. This is a breach of the fundamental principles of modern international law, of principles recognized by the legal systems, the decisions and the jurisprudence of civilized countries.

For this reason I consider that the second objection brings the dispute to its culminating point, by the denial, in the present case, of a breach of international law.

11. This objection raises a question of the greatest juridical interest which also requires to be considered since the Parties argued it at length and with great skill ; it is said that what is involved in the present case is "nationalization" and not mere "expropriation" : that these are two very different things ; that in the case of nationalization complete indemnity is not required and that the nationalization does not contravene any principle of international law. It is said that there is no "positive rule of the law of nations relating to nationalization", that it is a political act. On this ground, too, it is contended that the Court lacks competence.

It is, however, undeniable that nationalization and expropriation are sometimes linked. Nationalization may entail expropriation. When "the setting-up of a public service absorbs a private undertaking there will be expropriation of the latter. The setting-up of a public service is not expropriation ; but in many cases it presupposes it." (Henry Laufenberger, *L'intervention de l'État en matière économique,* pp. 268-269.)

The Iranian law of May 1st specifically decreed : "expropriation of the Anglo-Iranian Company". Moreover, nationalization is not always an exclusively political act ; it may indeed raise certain questions which are purely legal questions—such as that which arises in the present case : can a State carry out nationalization, expropriate a concession, when it has bound itself to respect it always ? In other words, can a State renounce or restrict the exercise of its "police power" ? Of course, this is not a question which can be considered at the present time : it relates entirely to the merits of the case.

Even in the case of expropriation there is the preliminary act of the declaration of the public need or the public interest, which is generally regarded as a political question outside the scope of judicial appraisal.

12. I recognize that nationalization, in certain cases and in some of its aspects, is not the concern of international law, particularly if there is no discrimination between nationals and foreigners. The Iranian Government indeed sought to show that its laws had not discriminated in this way. I recognize that the two Nationalization Acts do not contain a single word indicating such discrimination. But, indeed, what is involved is "nationalization", and not State-acquisition *[étatisation]* which is often designated by the same word. And that must mean the exclusion of foreigners. Indeed, I believe that the two Iranian laws were applied only to the British company : the law of May 1st provides for the expropriation of that company alone.

13. It has been said that most of the arbitral awards which have been invoked and which lay down that compensation shall be complete, if not paid in advance, were made during the last

century, and doubt was expressed as to whether "in the middle of the twentieth century this Court is entitled to say that there exists at the present day a rule of international law, in accordance with the practice of civilized nations, which prohibits States from claiming that their nationalization laws should take precedence over the rights of individual foreigners derived from concessionary instruments".

Reliance has been placed upon the research work on nationalization carried out by the Institute of International Law, in the course of which the conclusion was reached that it was desirable, *de lege ferenda*, "to lay down some legal rules of such a nature as to secure for individual rights that minimum of protection which existing positive international law fails to provide". I would point out that the first draft of M. de La Pradelle—the same professor who, as it has been said, would like to sweep away, in the face of the modern phenomenon of nationalization, all the old decisions relating to expropriation—and the final draft, both published in the *Annuaire* of the Institute of International Law for 1950, pages 67-132 (while taking the view that in the case of nationalization "such conditions are permissible as are not prohibitive : it shall suffice if the public interest is involved, and if the amount of compensation is based upon the means of the debtor, such means to be ascertained in a reasonable manner, and payment to be spread over a normal period of time"), that these drafts recognized, at the same time, the international character of the act of nationalization, by providing as follows : "it is for the State itself to deal with threats to its external economy caused by internal measures of the nationalizing State, and to seek redress therefor" (Article 12). In so providing, the draft rejected the rule according to which an international tribunal can only be seised after all local remedies have been exhausted (Article 13).

The basic provision of the draft was Article 5 :

> "Nationalization, as a unilateral act in the exercise of sovereignty, shall respect obligations validly undertaken, whether by treaty or by contract. Failing such respect there will be a denial of justice giving the right not merely to payment of compensation based upon value, but to damages of a punitive character."

Article 9 added the following :

> "Foreigners are entitled to international treatment even in the event of such treatment conferring greater rights than national treatment."

The draft provided for the exercise of jurisdiction by special tribunals exercising special technical jurisdiction (Article 13). All these provisions were incorporated in the final draft of the resolution.

It is true that the matter was again discussed this year at the conference which met at Siena. Far more "advanced" suggestions were put forward. This advance in doctrine is less far-reaching than that proposed in the matter of legislation or in the jurisprudence of this Court.

The fact that these lengthy discussions took place in the Institute of International Law proves the repercussions of nationalization upon international law. The multiplicity of treaties providing for compensation payable to foreigners by reason of acts of nationalization in various European countries, and the fact that payments have been effected between governments, also confirm the fact that nationalization frequently assumes the character of a problem of international law.

14. It is inevitable that everyone of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is inevitable, and even justified, because in its composition the Court is to be representative of "the main forms of civilization and of the principal legal systems of the world" (Statute, Article 9), and the Court is to apply "the general principles of law recognized by civilized nations". (Statute, Article 38 (1) *(c)*.)

In this connection I may be permitted to point out that in Brazil, in spite of the advance made in social legislation and in spite of certain restrictions placed upon the rights of owners of property, in particular with regard to letting, the jurisprudence of the Supreme Court provides strict guarantees for the payment to the expropriated property owner of just, full and prior compensation. With regard to nationalization, the present Constitution, promulgated by the National Assembly in 1946, provides as follows :

> "The Federal Union may intervene in the economic sphere and monopolize certain industries or activities, by means of special law. The intervention shall be based upon the public interest, and shall be limited by the fundamental rights assured in this Constitution." (Article 146.)

Among the constitutional guarantees is included that of the right of property, subject to a right of expropriation "for public necessity or utility, or social interest, with prior and just compensation in money". (Article 141, para. 16.)

I am fully aware that measures of nationalization are in every country inspired by the conception of ownership by the State, so that compensation may even be withheld as a measure of punishment of the former owners for the attitude adopted by them (Joyce Gutteridge, "Expropriation and Nationalization"», in *The International and Comparative Law Quarterly*, January 1952, pp. 14-28).

15. It may be that in the present case we are not concerned with the "positive law of nations", which is the law strictly laid down in treaties or conventions. There is no treaty which mentions, in a detailed manner, every one of the "principles of international law" which States are bound to observe. The "principles of ordinary international law" precede, inspire and govern treaties ; they flow from treaties, from doctrine and from the general legal system. In present-day law, there is no finer or more fruitful principle than that providing for the distribution of burdens and of damage suffered. Where damage has been suffered by a member of the community in the interests of the latter it would be unjust that that member alone should bear the full burden of the sacrifice.

In my opinion the same principle must apply in the case of nationalization of enterprises already established. If the interests of the community are invoked, in such cases, in order to justify payment of less than full compensation, contrary to the practice adopted in cases of expropriation, we must nevertheless recognize that such a justification cannot be put forward as applying to foreigners who, by the very fact of nationalization, have been cast from the national community in whose favour nationalization has been carried out. There is no reason why, as may well be contended in the case of citizens of the nationalizing country, foreigners should be subjected to a "more extensive sacrifice" than is involved in the case of expropriation. This follows from the principles governing the treatment of foreigners, principles recognized by present-day international law.

It cannot be said that present-day conditions of international life have done away with the proposition here expounded. On the contrary, I think that they have given added weight to this proposition which has become a prerequisite of international co-operation in the economic and financial fields. When there are so many countries in need of foreign capital for the development of their economy, it would not only be unjust, it would be a grave mistake to expose such capital, without restriction or guarantee, to the hazards of the legislation of countries in which such capital has been invested.

16. I take it that the first duty of the Court is to ensure the observance of international law and to further its development. Upon an initial examination of the present case, I cannot exclude the possibility—the possibility, at least—that the Government of Iran has violated "the principles and practice of ordinary international law" which it had undertaken to observe in relation to British nationals. On the contrary, there are very strong indications of such a violation.

I agree that it is not sufficient, in order to establish the jurisdiction of the Court, merely to invoke the "principles of international law" guaranteed by the treaties to which reference has been made. It is necessary to ascertain whether the invocation of these principles is admissible.

The distinguished Counsel of the Iranian Government reminded us of the "consistently followed principle" of the Permanent Court, "according to which it is not sufficient for an applicant to invoke treaties .... in order to be entitled, on this pretext, to submit to the Court claims not related to the legal basis upon which reliance is placed. The Court must ascertain whether *prima facie* such a relationship exists." (Oral Arguments, Distribution 52/131, p. 60.)

Without, at this stage, examining the acts and contentions of the Iranian Government further than is necessary for the purpose of arriving at a decision on the Preliminary Objection, I deem it essential to note the violation or, at least, the apparent violation, of the general principles of ordinary international law, by a denial of justice, by the failure to honour the indisputable guarantees granted to British nationals in Iran. This preliminary examination is also necessary to show that certain propositions of the Iranian Government, designed to exclude the jurisdiction of the Court, are ill-founded.

We must consider the situation upon which the Court has to adjudicate. It will be seen that if this case, in spite of its relevance, its gravity, and the evidence it provides of violations of international law, is held to be outside the jurisdiction of the Court, the Statute should be amended in order to ensure that the defect thus revealed may be remedied for the future.

17. The law of May 1st provides for "the dispossession" of the Company. How was this effected ? By legal proceedings ? *Manu militari ?* I do not know.

I note that the Iranian Government, in its "*Observations*", refers to the British Company as the "former Company". This is the expression used in the law of May 1st : "former", or in French, "ancienne". This indicates that the Company is regarded as having ceased to exist as a result of the Nationalization Decrees.

The Iranian *Observations* state that no legislative assembly can be bound by previous assemblies. If this were so, the existence of vested rights could be denied. A quotation from Jèze is relied upon. This quotation, which appears in the Iranian pleading and which is said to be supported by Duguit, Hauriou and Barthélemy, is evidence of the extent of the Iranian understanding of the action of Parliament. According to this understanding, vested rights do not exist. Parliament could, at any time, in its discretion, annul the concessionary contract of the Anglo-Iranian Oil Company.

But the Respondent has failed to read attentively the words of Jèze which are set out on page 11 of the pleading. He [Jèze] refers to "a general, impersonal legal situation".

The quotation is not concerned with individual situations or concessional contracts, as in the case of the Anglo-Iranian Oil Company. With regard to such situations the theory of Jèze, if I am

not mistaken, is entirely in the opposite sense. This is what he says in the same work :

> "The individual legal situation cannot be modified by the law. The legal act which has created this situation cannot be retracted, revoked, or modified by a law. Once a legal act has created, in a regular manner, an individual right or an individual obligation, that right and that obligation cannot be interfered with by Parliament, irrespective of whether the latter acts in the capacity of legislator or of administrative authority. These rights and obligations must remain intact." (Pp. 180-181.)

It is also incorrect to say that the theory of Jèze is supported by three other eminent French writers, quite apart from the fact that it has not the meaning which has been ascribed to it. The opinions of Duguit, Hauriou and Barthélemy are referred to by Jèze in another part of his work and on a different question.

The argument has been taken even further : it has been said and repeated (paragraphs 9 and 27 of the *Observations*) that the Iranian Government always considered the 1933 Concession to be "null and void". It has been contended that "the invalid Concession of 1933 and all its Articles disappeared automatically". As a result, it is said, Articles 21 and 22 of the "so-called Concession" have become non-existent. It would seem, however, that the aforesaid Article 21 is capable even of preventing the Nationalization Decree ; and Article 22 provides mandatorily and in the widest terms, that "any differences between the Parties of any nature whatever, and in particular any differences arising out of the interpretation of this Agreement and of the rights and obligations therein contained .... shall be settled by arbitration". The same Article lays down detailed rules governing the constitution of the arbitration tribunal.

The Iranian Government states expressly that it refuses to appoint an arbitrator and to accept the procedure laid down in Article 22. It justifies this decision by the contention that the Concession granted to the Anglo-Iranian Oil Company is null and void. This contention would appear to be ill-founded because neither the Iranian laws of March 15th and 20th, 1951, nor that of May 1st of the same year, provided for the dissolution of the Anglo-Iranian Oil Company or the annulment of its contract, nor could they, in fact, do so. Even if the annulment of the contract could have been decreed, for the purpose of nationalizing the oil industry, by the unilateral act of one of the parties to the contract—the Iranian Government—it would not follow that this act would exclude the jurisdiction of the arbitral tribunal provided for in Article 26 of this contract. It could be argued that that tribunal would retain jurisdiction to decide as to the effects and the questions resulting from this act and to assess the compensation payable, and also to decide whether it considers such compensation to be legitimate.

This question, however, is concerned with the merits of the case. The Court would be competent, in the event of the Preliminary Objection being overruled, to determine only whether or not there exists a duty to submit the dispute to arbitration.

In any event, the argument that any possibility of applying Article 26 should be excluded at this stage appears to be ill-founded ; this possibility might even continue to exist in the event of the contract being revoked, because in that case the application of Article 26 would be necessary. I cannot believe that the arbitrary revocation of the concessionary contract, and thereby of Article 26, can be invoked for the purpose of excluding the jurisdiction of the Court to determine the validity of that act of revocation.

The Iranian law of May 1st, without expressly mentioning Article 26 of the Concession Agreement, provided for a commission of five deputies and five senators, to be elected by the two Houses of Parliament, together with the Minister of Finance, which commission would be charged with the examination "by the Government" of the claims of the Government itself, and of the "*rightful claims*" of the Company. The conclusions and suggestions of this commission were to be submitted to Parliament for its approval. The commission was to complete its work and to present its report to Parliament before July 31st, 1951 ; that is, ten and a half months ago. Thus, the claims, even of the Government, and those of the Company, the "ex-Company", which are "*rightful*", are to be determined by a Parliamentary commission. In a case such as the present, which is said to be concerned with "national liberation", and in which popular passions are inflamed, I cannot conceive that the representatives of the people can possibly have the detachment essential to make the necessary decisions.

Counsel for Iran told the Court that the Company should present its claims to this commission, await its decision, and if it did not accept that decision, institute proceedings in the local courts. This solution, however, was ruled out by Article 26 of the 1933 Contract, which provided that an arbitration tribunal should determine all questions arising under the contract. The refusal to set up this tribunal constitutes a denial of justice on the part of the Iranian Government. I agree with the observation in the report of the Committee, quoted by Freeman, to the effect that a refusal by a competent judge to act constitutes a denial of justice. (*Denial of Justice*, p. 688.)

I see in this a grave violation of international law, particularly since the decision of the Parliamentary commission, essentially political in character, having been approved by Parliament, would become law and would not be required to respect any right whatever of the British company.

Indeed, the Iranian constitutional law of October 8th, 1907, as set out in the well-known book by Peaslee *Constitutions of Nations*, p. 207, provides, in Article 6, that :

"The life and property of foreigners resident in Iran are secured and guaranteed, *except in those cases in which the laws of the realm make exceptions.*" (My italics.)

In present-day constitutional law I do not know of a more striking example of violation of one of the fundamental principles of international law.

18. It is true that the Government of Iran has not rejected the idea—at least the idea, or the principle of compensation. Two propositions have been referred to, and, at first sight, they may appear quite reasonable and worthy of consideration. But some of the Iranian arguments seek to justify a reduction of the compensation payable to an amount not exceeding the value of the physical property, or a reduction of the amount of compensation to nothing, by deducting from it large sums which the Company is said to have improperly received, or on account of the excessive profits it is said to have made.

The Court is not concerned with such questions. But I do not think that it can shut its eyes to the situation so arising : in short, in spite of certain proposals and attempts to find a solution, the Company has been dispossessed of its Concession and of all its property ; the Iranian Government considers that by its own arbitrary authority the Company has been dissolved, and the Concession has ceased to exist, without any money having been paid by way of compensation. Provision has merely been made in the law, on paper, for the establishment of a fund for compensation—nobody knows whether any money at all has yet been paid into this fund ; it is impossible to foresee how long it would take for this fund to reach the amount, as yet undetermined, required for compensation ; the amount, which is recognized to be due, has not yet been fixed, nor has any adequate procedure been laid down to provide for a just assessment of this amount ; the arbitration tribunal provided for in the contract has been ignored and a Parliamentary commission has been substituted for it. All this gives the impression of disguised confiscation. Does international law permit this ?

19. I remain convinced, perhaps erroneously, that the most advanced tendencies of public law have not yet reached the stage where such treatment of a foreign concession and such provisions directed against the rights and property of foreign nationals can be accepted.

Nicholas R. Doman, in a study of the jurisprudence of the Permanent Court, has said :

> ".... it has been recognized frequently that a State has an international liability to foreign owners of expropriated property even though it acted through non-discriminatory legislation". (*Columbia Law Review*, 1948, p. 1132).

Perhaps we are on the way to great changes in the rules which are applicable. It may be that we shall succeed in adopting formulæ reconciling the extreme views which exist (Oppenheim, *International Law*, Lauterpacht edition, Vol. I, para. 155d; J. P. Miller, Jr., "*Du traitement par les gouvernements des intérêts étrangers*, 1950, pp. 131-138).

This solution will, no doubt, be influenced by considerations arising from the internal policy of each country concerned. This does not mean that the problem is thereby excluded from international law. On the contrary, international law must contribute to this solution by asserting itself over the narrow views of Jacobin nationalism.

I shall merely recall the terms in which Freeman, without any exaggeration whatever, has summed up the generally accepted theory :

> "Whatever may be said of the nature of the State's obligation to permit aliens to acquire property on its territory, it is certain that once they have been permitted to do so, international law attaches a certain quality of sanctity to the rights thus obtained, as well as to those private rights which have been acquired elsewhere." (*Denial of Justice*, p. 516.)

It is thus obvious that if a State ensures the "sanctity" of rights which it has allowed a foreign national to acquire, it must all the more respect the rights which it has itself conferred by virtue of a contract.

Freeman acknowledges that the State retains its "power of eminent domain" and that it can modify the rights of foreign nationals by general laws. But he observes :

> ".... whereas, on the other hand, any measures expropriating private property without compensation and directed against the property of aliens as such would violate international law". (*Op. cit.*, p. 517.)

And he adds :

> "Although there is some difference of opinion among text-writers, the preponderance of legal authority accepts the view that no foreigner may be deprived of his property without adequate compensation—except, of course, in the special case of judicial liquidation and analagous proceedings. This theory is generously supported by diplomatic practice and by the jurisprudence of international tribunals to such an extent that a general rule requiring compensation must be held to form a part of the positive law governing relations between States." (*Op. cit.*, pp. 517-518.)

I would not venture to make any suggestions *de lege ferenda*, or to try and foresee the way in which contemporary trends may

develop. Nor do I wish to exercise any influence whatever upon such trends. I would merely observe that within the United Nations —an organization of which this Court is a part, its principal judicial organ—the "International Bill of Human Rights" is being transformed into a binding international convention. I would point out that Article XVII of this Bill, which was approved by the General Assembly of the United Nations in December 1948, reads as follows:

> "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property."

20. To sum up, I am of opinion that, even if nationalization itself is considered not to be the concern of international law, the circumstances surrounding the action of the Government of Iran in the present case are such that they appear to indicate a very grave violation of the principles of international law.

21. As I have already said, other objections were put forward in addition to the first two which I have mentioned above (paragraph 8). Thus, it has been said that the treaties with Denmark, Switzerland and Turkey were "*res inter alios acta*", so far as the United Kingdom was concerned. But the effect of the most-favoured-nation clause is precisely that of making applicable to a third State, not a party to the later treaty, the provisions of that treaty. It is then no longer *res inter alios*.

It has been admitted in this case that the three treaties of 1934 and 1937 operated in conjunction with the treaties of 1857 and 1903. This is the only valid argument. It is well founded. But, the issue nevertheless remains within the terms of the Iranian Declaration because the latter requires (according to the Iranian interpretation) that it should apply "to situations or facts relating directly or indirectly to the application of treaties .... subsequent to the ratification". It cannot be argued—the Declaration does not so provide —that it applies only to "situations or facts" relating *exclusively* to the application of treaties subsequent to 1932. It is sufficient, therefore, if the facts relate to the application of the treaties of 1934 and 1937, although they may at the same time also relate to the treaties of 1857 and 1903. In the present case the application of the treaties of 1934 and 1937 results "indirectly" from the operation of the treaties of 1857 and 1903.

The argument that it was not the intention of the Iranian Government to accept this interpretation of the terms of its Declaration does not suffice to exclude that interpretation. It may be that the Iranian Government did not foresee that this result would follow from the expressions used in the Declaration. That does not matter: the important point is that it is bound by the terms used.

Similarly, the application of the Declaration by which Iran accepted the jurisdiction of the Court, cannot be excluded by reason

of the fact that other treaties preceding the Declaration had been concluded with other nations, which conferred upon British nationals, by virtue of the most-favoured-nation clause, the guarantees of international law, or by reason of the fact that an agreement to the same effect was contained in the Exchange of Notes with the British Government in 1928. These earlier conventions cannot be taken into account if one accepts—as I have done for the purpose of this argument—the Iranian interpretation which requires that the treaties and conventions must be subsequent to the ratification of the Declaration. The important point is that there are three treaties subsequent to that date.

I therefore reject the argument that the British Government is not entitled to rely on the treaties of 1934 and 1937, on the ground that they already enjoyed this guarantee, for the benefit of their nationals, by virtue of the Exchange of Notes which took place in 1928. It is clear that, if one excludes the application of this Exchange of Notes on the ground that it preceded the ratification of the Declaration, the British Government is still entitled to rely on subsequent treaties. The guarantee to observe international law was given to British nationals by Iran, directly by the Exchange of Notes in 1928, and indirectly, by virtue of the application of the most-favoured-nation clause, by ten treaties with other States. In order now to exclude the jurisdiction of the Court, in the face of the violation of this clear and repeated guarantee, the Iranian Government would exclude the application of conventions prior to 1932 by contending that the Declaration accepting the jurisdiction of the Court refers only to conventions of subsequent date; at the same time, the application of conventions subsequent to 1932 is said to be excluded by the fact that the same guarantee had already been given by a treaty prior to 1932. British nationals would thus be in a strange position: they would have the guarantee of the principles and practice of international law which Iran gave in the treaties with several States and in the Exchange of Notes with a representative of the United Kingdom, but they would be unable to invoke it before this Court. The artificiality of this argument is obvious.

It was also argued that the Treaties of 1857 and 1903, being capitulatory treaties, were revoked as a result of the abolition of the régime of capitulations: the most-favoured-nation clause is said to have disappeared. This argument, however, was sufficiently disposed of by pointing out that Counsel for Iran did not go as far as that and did not contest the continued operation of the clause and of Article 9 of the Treaty of 1857 and Article 2 of the Treaty of 1903 in which it is contained.

It might have been said that these two treaties were not "accepted by Persia", a condition which, as I have already said, is subjective and difficult of application. I do not think that Counsel for Iran submitted to the Court that these two treaties were affected by

this condition. In any event, such a consideration would not justify the exclusion of the most-favoured-nation clause because that clause is justified precisely by the abolition of the capitulatory régime ; and this abolition did not bring about the annulment of the clause. The clause is perfectly compatible with the régime of the abolition of capitulations. It was contained in some ten treaties concluded by Iran.

Another argument was to the effect that the most-favoured-nation clause confers advantages and favours, and that a guarantee to observe the principles of international law is neither. It is obvious that to accept the proposition that the guarantee of the principles and practice of international law is not an advantage, it would be necessary to give to the most-favoured-nation clause a meaning limited to the narrowest possible material interests and benefits.

Furthermore, it was sought to belittle the scope of this guarantee by describing it as an implicit rule, binding in any event, and arguing that its inclusion in a treaty had no significance. I agree that this should be the case. Respect for the principles and practice of international law is the first duty of civilized nations ; without it any international organization is inconceivable. It is not necessary to lay down this rule in a treaty. In any event, it may be considered as being expressly contained in the Charter of the United Nations.

However, if we are agreed on this proposition, we must still examine the consequences which follow from its acceptance. The first consequence would be to accept the jurisdiction of the Court in all cases in which these principles have been violated, or in which disputes concerning their application have arisen. With the exception of a few opinions of great value, this proposition is not yet generally accepted. The jurisprudence of the Court leans towards a refusal to recognize international obligations which have not been expressly provided for in a special treaty.

How, then, can it be said that a treaty which creates an express obligation to observe the principles and practice of international law is of no significance, and that this obligation is always implicit ?

The last objection put forward against the application of the most-favoured-nation clause for which the United Kingdom Government contends, is that the Treaties of 1857 and 1903 cannot be invoked because they preceded the ratification of the Iranian Declaration. As I have already pointed out, however, this Declaration, even if the Iranian interpretation be accepted, does not require that the dispute should relate "exclusively" to the application of treaties subsequent to 1932. The dispute may arise out of the application of a treaty subsequent to 1932 and, at the same time, out of another treaty prior to that date. This applies with greater force where, as in the present case, the earlier treaty only brings about the appli-

cation of the later treaty. As I have pointed out, the rights of British nationals flow from the treaties of 1934 and 1937 which are applicable to them by virtue of the provisions contained in the Treaties of 1857 and 1903.

22. In conclusion, my first impression in this preliminary stage of the proceedings is that there have been very serious violations of the principles and practice of international law, of principles the observance of which had been guaranteed to British nationals in Iran by three treaties subsequent to the ratification of the Iranian Declaration accepting the jurisdiction of the Court. I would, therefore, overrule the objection to the jurisdiction and hold that the Court has jurisdiction to decide as to the submission of the dispute to the arbitration tribunal, in accordance with the submission contained in paragraph *(a)* of the Application filed by the United Kingdom.

I am of opinion that, having regard to this conclusion, the argument of Counsel for the United Kingdom relating to *forum prorogatum* does not arise. The other objections of non-admissibility which were put forward by the Iranian Government would have to be considered later if the Court decided in favour of its jurisdiction. Having upheld the objection to the jurisdiction, the Court cannot deal with the other objections.

In any event, any further proceedings should be suspended until a further decision by the Security Council of the United Nations.

(Signed) LEVI CARNEIRO.