COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE A L'INCIDENT AÉRIEN DU 27 JUILLET 1955

(ISRAËL c. BULGARIE)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 26 MAI 1959

1959

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE AERIAL INCIDENT OF JULY 27th, 1955

(ISRAEL *v.* BULGARIA)

PRELIMINARY OBJECTIONS

JUDGMENT OF MAY 26th, 1959

Le présent arrêt doit être cité comme suit:

« *Affaire relative à l'incident aérien du 27 juillet 1955 (Israël c. Bulgarie), Exceptions préliminaires, Arrêt du 26 mai 1959: C. I. J. Recueil 1959, p. 127.* »

This Judgment should be cited as follows:

"*Case concerning the Aerial Incident of July 27th, 1955 (Israel* v. *Bulgaria), Preliminary Objections, Judgment of May 26th, 1959: I.C.J. Reports 1959, p. 127.*"

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INTERNATIONAL COURT OF JUSTICE

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May 26th, 1959

CASE CONCERNING THE AERIAL INCIDENT OF JULY 27th, 1955

(ISRAEL *v.* BULGARIA)
PRELIMINARY OBJECTIONS

Compulsory jurisdiction of International Court of Justice.—Declarations accepting compulsory jurisdiction of Permanent Court of International Justice.—Article 36, paragraph 5, of Statute of Court.—Determination of States to which Article 36, paragraph 5, applies.—Conditions required for application of Article 36, paragraph 5.—Lapse of a declaration following dissolution of Permanent Court.

JUDGMENT

Present: *President* KLAESTAD; *Vice-President* ZAFRULLA KHAN; *Judges* BASDEVANT, HACKWORTH, WINIARSKI, BADAWI, ARMAND-UGON, KOJEVNIKOV, Sir Hersch LAUTERPACHT, MORENO QUINTANA, CÓRDOVA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER; *Judges ad hoc* GOITEIN and ŽOUREK; *Deputy-Registrar* GARNIER-COIGNET.

In the case concerning the Aerial Incident of July 27th, 1955,

between

the State of Israel,
represented by

Mr. Shabtai Rosenne, Legal Adviser to the Ministry for Foreign Affairs,

as Agent,

assisted by

Mr. M. Shneerson, Minister Plenipotentiary, Embassy of Israel, Paris,

Mr. J. H. Lazarus, Assistant to the Attorney-General, Ministry of Justice,

Mr. F. Landau, Assistant to the State-Attorney, Ministry of Justice,

Mr. T. Meron, Assistant to the Legal Adviser, Ministry for Foreign Affairs,

as Counsel,

and

the People's Republic of Bulgaria,
represented by

Dr. Nissim Mévorah, Professor of Civil Law at the University of Sofia, Adviser to the Ministry for Foreign Affairs,

as Agent,

assisted by

M. Evguéni Kamenov, Envoy Extraordinary and Minister Plenipotentiary of Bulgaria in France,

as Counsel,

and by

M. Pierre Cot, *Professeur agrégé* of the Faculties of Law of France,

and

Me Marc Jacquier, of the Bar of the Paris Court of Appeal,
as Advocates,

THE COURT,

composed as above,

delivers the following Judgment:

On October 16th, 1957, the Minister of Israel to the Netherlands handed to the Registrar an Application by the Government of Israel,

dated October 9th, 1957, instituting proceedings before the Court against the Government of the People's Republic of Bulgaria with regard to the destruction, on July 27th, 1955, by the Bulgarian anti-aircraft defence forces, of an aircraft belonging to El Al Israel Airlines Ltd.

The Application invoked Article 36 of the Statute of the Court and the acceptance of the compulsory jurisdiction of the Court by Israel, on the one hand, in its Declaration of October 3rd, 1956, replacing the previous Declaration of September 4th, 1950, and by Bulgaria, on the other hand, on July 29th, 1921. In accordance with Article 40, paragraph 2, of the Statute, the Application was communicated to the Government of the People's Republic of Bulgaria. In accordance with paragraph 3 of the same Article, the other Members of the United Nations and the non-Member States entitled to appear before the Court were notified.

Time-limits for the filing of the Memorial and the Counter-Memorial were fixed respectively by Orders of the Court of November 26th, 1957, and January 27th, 1958. The Memorial was filed within the time-limit fixed for this purpose. Within the time-limit fixed for the filing of the Counter-Memorial, the Government of the People's Republic of Bulgaria filed preliminary objections to the jurisdiction of the Court. On December 17th, 1958, an Order, recording that the proceedings on the merits were suspended under the provisions of Article 62 of the Rules of Court, granted the Government of Israel a time-limit expiring on February 3rd, 1959, for the submission of a written statement of its observations and submissions on the preliminary objections. The written statement was filed on that date and the case became ready for hearing in respect of the preliminary objections.

Mr. Justice Goitein, of the Supreme Court of Israel, and M. Jaroslav Žourek, member of the International Law Commission of the United Nations, were respectively chosen, in accordance with Article 31, paragraph 3, of the Statute, to sit as Judges *ad hoc* in the present case by the Government of Israel and the Government of Bulgaria.

On March 16th, 17th, 18th, 19th, 23rd, 24th, 25th and 26th and on April 1st, 2nd and 3rd, 1959, hearings were held in the course of which the Court heard the oral arguments and replies of M. Mévorah, Agent, M. Kamenov, Counsel, and M. Cot, Advocate, on behalf of the Government of the People's Republic of Bulgaria, and of Mr. Rosenne, Agent, on behalf of the Government of Israel.

In the course of the written and oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Israel, in the Application:

"That it may please the Court:

(a) Subject to the presentation of such written and oral pleadings as the Court may direct, to adjudge and declare that the People's Republic of Bulgaria is responsible under international law for

the destruction of the Israel aircraft 4X-AKC on 27 July 1955 and for the loss of life and property and all other damage that resulted therefrom;

(b) To determine the amount of compensation due from the People's Republic of Bulgaria to Israel;

(c) In exercise of the power conferred upon it by Article 64 of the Statute of the Court, to decide that all costs and expenses incurred by the Government of Israel be borne by the Government of the People's Republic of Bulgaria."

On behalf of the same Government, in the Memorial:

"I. On the first petition of the Application instituting Proceedings:

Whereas units of the armed forces of Bulgaria opened fire on 4X-AKC and shot it down and destroyed it, killing all its occupants, as has been admitted by the Government of Bulgaria;

And whereas the Government of Bulgaria has furthermore admitted that in so doing its armed forces displayed a certain haste and did not take all the necessary measures to compel the aircraft to land, and has stated that it would identify and punish the culpable persons and pay compensation;

And whereas such action was in violation of international law;

May it please the Court

To judge and declare

That Bulgaria is responsible under international law for the destruction of Israel aircraft 4X-AKC, on 27 July 1955, and for the loss of life and property and all other damage that resulted therefrom.

II. On the second petition of the Application instituting Proceedings:

(a) Whereas the Government of Israel has established that the financial loss incurred by the persons whose cause is being adopted by it amounts to the sum of U.S. Dollars 2,559,688.65;

May it please the Court

To give judgment in favour of the claim of the Government of Israel and fix the amount of compensation due from Bulgaria to Israel at U.S. Dollars 2,559,688.65;

(b) Whereas the Government of Israel has stated that a declaration by the Court regarding the international responsibility of Bulgaria, as contained in Submission No. I, would be sufficient satisfaction and that it was waiving any further claim to reparation;

And whereas, nevertheless, the Government of Israel has asked the Court to take note of the failure of the Government

of Bulgaria to implement its undertaking to identify and punish the culpable persons;

May it please the Court

To place the foregoing on record.

III. On the third petition of the Application instituting Proceedings:

May it please the Court

(a) To judge and declare

that the expenses incurred by the Government of Israel in preparing this claim, assessed at I £ 25,000, be borne by the Government of Bulgaria.

(b) To decide

that the costs of the Government of Israel in this case shall be borne by the Government of Bulgaria.

IV. And further to judge and declare that the sum awarded under Submission No. II *(a)*, with interest at six per cent per annum from 27 July 1955 until the date of payment, together with the expenses and costs incurred in this case, shall be paid by the Government of Bulgaria to the Government of Israel in Israel."

On behalf of the People's Republic of Bulgaria in the Preliminary Objections (communications of December 4th and 8th, 1958):

"May it please the Court,

Whereas Article 36, paragraph 5, of the Statute of the International Court of Justice is inapplicable in regard to the People's Republic of Bulgaria,

Whereas the International Court of Justice is without jurisdiction to adjudicate on the Application of the Government of Israel since the latter submits to the Court a dispute which relates to situations and facts that arose prior to the alleged acceptance of the compulsory jurisdiction of the International Court of Justice by the People's Republic of Bulgaria,

For these reasons and all others which may be presented or which the Court should consider it appropriate to add thereto or to substitute therefor,

To adjudge and declare

That the Court is *without jurisdiction* in the case concerning the aerial incident of July 27th, 1955, and also

That the Application filed on October 16th, 1957, by the Government of Israel against the Government of the People's Republic of Bulgaria is *inadmissible;*

In the alternative,

May it please the Court,

Whereas the State of Israel can act in defence of its nationals only and whereas the damage in respect of which it seeks reparation

was for the most part suffered by non-Israel insurance companies,

Whereas the dispute referred to the International Court of Justice by the Israel Government is subject to the exclusive jurisdiction of the People's Republic of Bulgaria; and whereas moreover it falls in any event essentially within the domestic jurisdiction of Bulgaria,

Whereas the Government of Israel has not exhausted the remedies available in the Bulgarian courts before applying to the Court,

For these reasons and all others which may be presented or which the Court should consider it appropriate to add thereto or to substitute therefor,

To adjudge and declare that the Application filed on October 16th, 1957, by the Government of Israel against the Government of the People's Republic of Bulgaria is *inadmissible*."

On behalf of the Government of Israel, in its Written Observations on the Preliminary Objections:

"May it please the Court,

Rejecting all Submissions to the contrary,

To dismiss the Preliminary Objections, and

To resume the proceedings on the merits."

On behalf of the Government of the People's Republic of Bulgaria, Submissions deposited in the Registry on March 20th, 1959, after the first oral presentation of that Government's case:

"May it please the Court,

On the First Preliminary Objection,

Whereas the Declaration of August 12th, 1921, by which the Kingdom of Bulgaria had accepted the compulsory jurisdiction of the Permanent Court of International Justice and which formed part of the Protocol of Signature of the Statute of that Court, ceased to be in force on the dissolution of the Permanent Court, pronounced by the Assembly of the League of Nations on April 18th, 1946;

Whereas that Declaration was therefore no longer in force on the date on which the People's Republic of Bulgaria became a party to the Statute of the International Court of Justice; and whereas it cannot accordingly be regarded as constituting an acceptance of the compulsory jurisdiction of the International Court of Justice, by virtue of Article 36, paragraph 5, of the Statute of that Court,

For these reasons,

To adjudge and declare that the Court is without jurisdiction to adjudicate upon the Application of the Government of Israel relating to the aerial incident of July 27th, 1955.

On the Second Preliminary Objection,

Whereas the dispute referred to the Court relates to situations or facts prior to the alleged acceptance of the compulsory jurisdiction of the International Court of Justice which is said to result from the accession of the People's Republic of Bulgaria to the Statute of that Court on December 14th, 1955;

Whereas the Government of Israel, in accepting the compulsory jurisdiction of the International Court of Justice, excluded disputes prior to the date of its submission to that compulsory jurisdiction;

Whereas, on the basis of reciprocity, the Government of the People's Republic of Bulgaria cannot, in any event, be regarded as having accepted the compulsory jurisdiction of the International Court of Justice in respect of facts prior to December 14th, 1955,

For these reasons,

To adjudge and declare that the Court is without jurisdiction to adjudicate upon the Application of the Government of Israel relating to the aerial incident of July 27th, 1955.

On the Third Preliminary Objection,

Whereas the Government of Israel can act in defence of its nationals only; whereas it does not dispute that all or part of the damage in respect of which it seeks compensation was covered by insurance; whereas it provides no evidence of the Israel nationality of the insurers,

For these reasons,

To adjudge and declare that the Government of Israel has no capacity to submit to the Court claims to a right to be indemnified which has been the subject of assignment or subrogation in favour of insurance companies not of Israel nationality.

On the Fourth Preliminary Objection,

Whereas it appears from the Memorial filed on behalf of the Government of Israel that the Application, of which the Court is seised, is based upon action undertaken by the Bulgarian anti-aircraft defence armed forces, in the Bulgarian airspace; whereas the dispute, which has arisen as a result of such action, does not fall within any of the categories referred to in Article 36, paragraph 2, of the Statute of the International Court of Justice, but, on the contrary, falls within the exclusive jurisdiction of the People's Republic of Bulgaria;

Whereas, moreover, this dispute is one 'relating to matters which are essentially within the domestic jurisdiction of the Bulgarian State'; whereas in virtue of reservation '*(b)*' included by the Government of Israel in its Declaration of Acceptance of the compulsory jurisdiction of the Court—which reservation the Bulgarian Government claims to be entitled to apply in its favour, on the basis of reciprocity—the dispute falls outside the jurisdiction of the International Court of Justice,

For these reasons,

To adjudge and declare that the Court is without jurisdiction to adjudicate upon the Application of the Government of Israel relating to the aerial incident of July 27th, 1955.

On the Fifth Preliminary Objection,

Whereas the nationals of Israel whose claims are presented by the Government of Israel have not exhausted the remedies available to them in the Bulgarian courts before applying to the International Court of Justice,

For these reasons,

To adjudge and declare that the claim of the Government of Israel cannot, at the present stage, be submitted to the Court."

On behalf of the Government of Israel, Submissions filed at the hearing of March 26th, 1959:

"May it please the Court,

Rejecting all Submissions to the contrary,
To dismiss the Preliminary Objections, and
To resume the proceedings on the merits."

On behalf of the Government of the People's Republic of Bulgaria, Submissions filed in the Registry on April 2nd, 1959, after the oral reply:

"On the Fifth Preliminary Objection,

Whereas the nationals of Israel whose claims are presented by the Government of Israel had not exhausted the remedies available to them in the Bulgarian courts before the reference by that Government to the International Court of Justice,

For these reasons,

To adjudge and declare that the claim of the Government of Israel cannot, at the present stage, be submitted to the Court."

At the hearing of April 3rd, 1959, at the end of his oral rejoinder, the Agent for the Government of Israel confirmed the formal Submissions set forth in the Written Observations submitted on behalf of his Government.

* * *

It was stated to the Court that on the morning of July 27th, 1955, the civil Constellation aircraft No. 4X-AKC, wearing the Israel colours and belonging to the Israel Company El Al Israel Airlines Ltd., making a scheduled commercial flight between Vienna, Austria, and Lod (Lydda) in Israel, having, without previous authorization, penetrated over Bulgarian territory, was shot down by aircraft of the Bulgarian anti-aircraft defence forces. After catching fire, the Israel aircraft crashed in flames near the town of

Petritch, Bulgaria, and all the crew, consisting of seven members, and also the fifty-one passengers of various nationalities were killed.

These facts gave rise to negotiations and diplomatic correspondence between the two Governments which attempted in that way to arrive at a friendly solution. As these diplomatic approaches did not lead to a result which was satisfactory to the Parties to the case, the Government of Israel submitted the dispute to the Court by means of an Application instituting proceedings on October 16th, 1957. Against this Application the Government of the People's Republic of Bulgaria advanced five Preliminary Objections.

The Court will proceed to consider the First Preliminary Objection.

* * *

The Government of Israel claims to find a basis for the jurisdiction of the Court in the present case by invoking in its Application the fact that "Bulgaria's acceptance of the compulsory jurisdiction was made on 29th July, 1921, on the occasion of the deposit of the instrument of that country's ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice". In its Memorial, it reproduced the declaration thus invoked under the date of August 12th, 1921, which is the date of its ratification by the Government of the Kingdom of Bulgaria and therefore the date of its entry into force. The Memorial adds: "Bulgaria became a Member of the United Nations on 14 December, 1955 ... when that country's Declaration became applicable to the jurisdiction of the International Court of Justice." While not so stating at the time, though it was thus understood by the Bulgarian Government and explained in the subsequent proceedings, the Government of Israel rested this reference to the 1921 Declaration on Article 36, paragraph 5, of the Statute of the International Court of Justice.

Thus, the Government of Israel relies on two provisions. The first is the Declaration signed on July 29th, 1921, at the same time as the Protocol of Signature of the Statute of the Permanent Court of International Justice, and ratified on August 12th, 1921. This Declaration is in the following terms:

[Translation]

> "On behalf of the Government of the Kingdom of Bulgaria, I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, unconditionally."

The second provision is Article 36, paragraph 5, of the Statute of the International Court of Justice, which reads as follows:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force

shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

To justify the application of the latter provision to the Bulgarian Declaration of 1921, the Government of Israel relies finally on the fact that Bulgaria became a party to the Statute of the International Court of Justice as a result of its admission to the United Nations, pursuant to Resolution 995 (X) adopted by the General Assembly on December 14th, 1955.

The Government of the People's Republic of Bulgaria denies that Article 36, paragraph 5, of the Statute transferred the effect of the Bulgarian Declaration of 1921 to the jurisdiction of the International Court of Justice. Consequently, its First Preliminary Objection asks that it "may please the Court ... to adjudge and declare that the Court is without jurisdiction to adjudicate upon the Application of the Government of Israel relating to the aerial incident of July 27th, 1955".

The Court has to determine whether Article 36, paragraph 5, of the Statute is applicable to the Bulgarian Declaration of 1921.

The object of Article 36, paragraph 5, is to introduce a modification in the declarations to which it refers by substituting the International Court of Justice for the Permanent Court of International Justice, the latter alone being mentioned in those declarations, and by thus transferring the legal effect of those declarations from one Court to the other. That Article 36, paragraph 5, should do this in respect of declarations made by States which were represented at the San Francisco Conference and were signatories of the Charter and of the Statute, can easily be understood. This corresponds indeed to the very object of this provision. But is this provision meant also to cover declarations made by other States, including Bulgaria? The text does not say so explicitly.

At the time of the adoption of the Statute a fundamental difference existed between the position of the signatory States and of the other States which might subsequently be admitted to the United Nations. This difference is not expressed in the text of Article 36, paragraph 5, but it derives from the situation which that text was meant to regulate, namely, the transfer to the International Court of Justice of declarations relating to the Permanent Court of International Justice which was on the point of disappearing when the Statute was drawn up. The States represented at San Francisco knew what their own position was under the declarations they had made. They were acting with a full knowledge of the facts when they agreed to transfer the effect of those declarations to the compulsory jurisdiction of the new Court and they had the power to do so. These States were not in the same position with regard to the declarations signed by other States. In the case of

some of these, there might arise the question of the effect of the war, a question which does not appear then to have been considered. In a more general way, the signatory States could not regard as more or less imminent the admission to the United Nations of any of the other States, their admission being possibly preceded by the lapsing of the declarations of some of them; the question which the signatory States were easily able to resolve as between themselves at that time would arise in a quite different form in the future as regards the other States. The existence of these differences militates against a construction extending the effect of Article 36, paragraph 5, to declarations made by States subsequently admitted to the United Nations, on the mere ground that those declarations were in force at the time of the signing of the Charter or of its entry into force.

Article 36, paragraph 5, considered in its application to States signatories of the Statute, effects a simple operation: it transforms their acceptance of the compulsory jurisdiction of the Permanent Court into an acceptance of the compulsory jurisdiction of the International Court of Justice. This was done in contemplation of the dissolution of the old Court and the institution of a new Court, two events which, while not absolutely coincident, were sufficiently close so far as States signatories of the Charter and of the Statute were concerned. The transformation enacted was in their case contemporaneous with this double event. The position was quite different in respect of declarations by non-signatory States, apart from the possibility, which did not in fact materialize, of a non-signatory State's becoming a party to the Statute before the dissolution of the Permanent Court. Subject to this, the operation of transferring from one Court to the other acceptances of the compulsory jurisdiction by non-signatory States could not constitute a simple operation, capable of being dealt with immediately and completely by Article 36, paragraph 5. Such a transfer must necessarily involve two distinct operations which might be separated by a considerable interval of time. On the one hand, old declarations would have had to have been preserved with immediate effect as from the entry into force of the Statute, and, on the other hand, they would have had to be transferred to the jurisdiction of the International Court of Justice, a transfer which could only have been operated by the acceptance by the State concerned of the new Statute, in practice, by its admission to the United Nations. Immediate preservation of the declaration was necessary in order to save it from the lapsing by which it was threatened by the imminent dissolution of the Permanent Court which was then in contemplation. If it were not thus maintained in being, a subsequent transfer of the declaration to the jurisdiction of the new Court could not be effected. Thus, the problem of the transfer of former declarations from one Court to the other, which arose in the case of the acceptances of non-signatory States, was quite different

from that in the case of acceptances by States signatories of the Charter and of the Statute.

In addition to this fundamental difference in respect of the factors of the problem, there were special difficulties in resolving it in respect of acceptances by non-signatory States. These difficulties, indeed, rendered impossible the solution of the problem by the application of Article 36, paragraph 5, as drafted and adopted. Since this provision was originally subscribed to only by the signatory States, it was without legal force so far as non-signatory States were concerned: it could not preserve their declarations from the lapsing with which they were threatened by the impending dissolution of the Permanent Court. Since it could not maintain them in being, Article 36, paragraph 5, could not transfer their effect to the jurisdiction of the new Court as of the date when a State having made a declaration became a party to the Statute. Since these declarations had not been maintained in being, it would then have been necessary to reinstate lapsed declarations, then to transport their subject-matter to the jurisdiction of the International Court of Justice: nothing of this kind is provided for by Article 36, paragraph 5. Thus, the course it would have been necessary to follow at the time of the adoption of the Statute, in order to secure a transfer of the declarations of non-signatory States to the jurisdiction of the new Court, would have had to be entirely different from the course which was followed to achieve this result in respect of the declarations of signatory States. In the case of signatory States, by an agreement between them having full legal effect, Article 36, paragraph 5, governed the transfer from one Court to the other of still-existing declarations; in so doing, it maintained an existing obligation while modifying its subject-matter. So far as non-signatory States were concerned, something entirely different was involved: the Statute, in the absence of their consent, could neither maintain nor transform their original obligation. Shortly after the entry into force of the Statute, the dissolution of the Permanent Court freed them from that obligation. Accordingly, the question of a transformation of an existing obligation could no longer arise so far as they were concerned: all that could be envisaged in their case was the creation of a new obligation binding upon them. To extend Article 36, paragraph 5, to those States would be to allow that provision to do in their case something quite different from what it did in the case of signatory States.

The question of the transfer from one Court to the other of former acceptances of the compulsory jurisdiction is so different, according to whether it arises in respect of States signatories of the Statute or in respect of non-signatory States, that the date of the transfer, which it is a simple matter to determine in the case of signatory States, in spite of the silence on the point of Article 36, paragraph 5, can scarcely be determined in any satis-

factory way in the case of declarations of non-signatory States. If regard be had to the date upon which a non-signatory State became a party to the Statute by its admission to the United Nations or in accordance with Article 93, paragraph 2, of the Charter, the transfer is then regarded as occurring at a date which might be very distant from the entry into force of the Statute, and this would hardly be in harmony with the spirit of a provision designed to provide for the transition from the old to the new Court by maintaining something of the former regime.

On the point now under consideration, the States represented at San Francisco could have made an offer addressed to other States, for instance, an offer to consider their acceptance of the compulsory jurisdiction of the Permanent Court as an acceptance of the jurisdiction of the International Court of Justice. But, in that case, such an offer would have had to be formulated, and the form of its acceptance and the conditions regarding the period within which it must be accepted would have had to be determined. There is nothing of this kind in Article 36, paragraph 5. When this Article decides that, as between parties to the present Statute, certain declarations are to be deemed to be acceptances of the compulsory jurisdiction of the International Court of Justice, this can be easily understood as meaning that the Article applies to the declarations made by the States which drew it up. Such a form of expression is scarcely appropriate for the making of an offer addressed to other States.

Thus to restrict the application of Article 36, paragraph 5, to the States signatories of the Statute is to take into account the purpose for which this provision was adopted. The Statute in which it appears does not establish the compulsory jurisdiction of the Court. At the time of its adoption, the impending dissolution of the Permanent Court and, in consequence thereof, the lapsing of acceptances of its compulsory jurisdiction, were in contemplation. If nothing had been done there would have been a backward step in relation to what had been achieved in the way of international jurisdiction. Rather than expecting that the States signatories of the new Statute would deposit new declarations of acceptance, it was sought to provide for this transitory situation by a transitional provision and that is the purpose of Article 36, paragraph 5. By its nature and by its purpose, that transitional provision is applicable only to the transitory situation it was intended to deal with, which involved the institution of a new Court just when the old Court was being dissolved. The situation is entirely different when, the old Court and the acceptance of its compulsory jurisdiction having long since disappeared, a State becomes a party to the Statute of the new Court: there is then no transitory situation to be dealt with by Article 36, paragraph 5.

* * *

To the extent that the records of the San Francisco Conference provide any indication as to the scope of the application of Article 36, paragraph 5, they confirm the fact that this paragraph was intended to deal with the declarations of signatory States. Those of non-signatory States, in respect of which special provisions would have been necessary, were not envisaged.

This point had not been dealt with by the Washington Committee of Jurists. A Sub-Committee, sitting on April 13th, 1945, had merely drawn attention to the fact that many nations had previously accepted compulsory jurisdiction under the Optional Clause and added "that provision should be made at the San Francisco Conference for a special agreement for continuing these acceptances in force for the purpose of this Statute". This reference to a special agreement clearly indicated that in order to preserve these acceptances under a new system, the consent of States having made such declaration would be necessary: the contemplating of such an agreement indicated that the Conference could not substitute its decision for that of the States not there represented.

At the San Francisco Conference, the provision which became paragraph 5 of Article 36 was proposed by Sub-Committee D and discussed and adopted by Committee IV/1, on June 1st, 1945. In this Committee, the statements made mainly indicated the preference of many delegations for the Court's compulsory jurisdiction and their regret that it did not appear to be possible to adopt it. As to the meaning to be attributed to the provision which was to become paragraph 5 of Article 36, the Canadian representative said: "In view of the new paragraph ... as soon as States sign the Charter, the great majority of them would be automatically under the compulsory jurisdiction of the Court because of the existing declarations." The representative of the United Kingdom having for his part said that he thought "that some forty States would thereby become automatically subject to the compulsory jurisdiction of the Court", this optimistic estimate was corrected by the Australian representative in the terms thus recorded in the minutes: "He desired to call attention to the fact that not forty but about twenty States would be automatically bound as a result of the compromise. In this connection he pointed out that of the fifty-one States that have adhered to the optional clause, three had ceased to be independent States, seventeen were not represented at the Conference and about ten of the declarations of other States had expired." The representatives of the United Kingdom and of Australia, referring to the meaning which they attached to the paragraph which subsequently became paragraph 5, were indicating the number of

States to which, in their opinion, this provision would be applicable. The Australian representative, whose statement followed that of the representative of the United Kingdom, set out to correct the latter's estimate of the number of declarations which would thus be affected and, for this purpose, he rejected those of the seventeen States which were not "represented at the Conference". This statement clearly shows that in the view of the Australian representative, paragraph 5 was not intended to be applicable to the declarations of States not represented at the Conference. This statement, though it related to a point in the paragraph of cardinal importance, was not disputed by the representative of the United Kingdom or by any other member of the Committee. The conclusion to be drawn is that, in the view of the members of the Committee, the States not represented at the Conference remained outside the scope of the matter being dealt with by paragraph 5 and that that paragraph was intended to be binding only upon those States which, having been represented at the Conference, would sign and ratify the Charter and thus accept the Statute directly and without any probable delay.

This is confirmed by the report of Committee IV/1, approved by the Committee on June 11th, 1945. The report, having stated that the Committee proposed solutions for certain problems to which the creation of the new Court would give rise, sets out under *(a)* what is provided in Article 37, under *(b)* what is provided in paragraph 4 (which was to become paragraph 5) of Article 36, and adds: "*(c)* Acceptances of the jurisdiction of the old Court over disputes arising between parties to the new Statute and other States, or between other States, should also be covered in some way and it seems desirable that negotiations should be initiated with a view to agreement that such acceptances will apply to the jurisdiction of the new Court. This matter cannot be dealt with in the Charter or the Statute, but it may later be possible for the General Assembly to facilitate such negotiations." Thus a clear distinction was drawn between what could be dealt with by Article 36, paragraph 5, and what could only be dealt with otherwise, that is, by agreement, outside the provisions of the Statute, with the States absent from the San Francisco negotiations. If that did not refer exclusively to the declarations of such States, at least there is no doubt that it did refer to them and that they were principally referred to: the use of the word "acceptances" confirms this, if confirmation is necessary, and this word, which appears once only in the French text, appears twice in the English text of which indeed it is the first word.

This confirms the view that Article 36, paragraph 5, was designed to govern the transfer dealt with in that provision only as between the signatories of the Statute, not in the case of a State in the position of Bulgaria.

Finally, if any doubt remained, the Court, in order to interpret Article 36, paragraph 5, should consider it in its context and bearing in mind the general scheme of the Charter and the Statute which founds the jurisdiction of the Court on the consent of States. It should, as it said in the case of the *Monetary gold removed from Rome in 1943*, be careful not to "run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent". (*I.C.J. Reports 1954*, p. 32.)

Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears. But when, as in the present case, a State has for many years remained a stranger to the Statute, to hold that that State has consented to the transfer, by the fact of its admission to the United Nations, would be to regard its request for admission as equivalent to an express declaration by that State as provided for by Article 36, paragraph 2, of the Statute. It would be to disregard both that latter provision and the principle according to which the jurisdiction of the Court is conditional upon the consent of the respondent, and to regard as sufficient a consent which is merely presumed.

* * *

Even if it should be assumed that Article 36, paragraph 5, is not limited to the declarations of signatory States, the terms of that provision make it impossible to apply it to the Bulgarian Declaration of 1921. The Government of Israel, in order to base the jurisdiction of the Court upon the combined effect of the Bulgarian Declaration of 1921 and Article 36, paragraph 5, of the Statute, has construed that provision as covering a declaration made by a State, which had not participated in the San Francisco Conference, which is not a signatory of the Statute and only became a party thereto much later. The Court will also consider the matter from this angle and accordingly enquire whether the conditions, required by Article 36, paragraph 5, for a transfer from the Permanent Court of International Justice to the International Court of Justice of acceptances of compulsory jurisdiction relating only to the former, are satisfied in the present case and whether the Bulgarian Declaration must therefore "be deemed ... to be an acceptance of the compulsory jurisdiction of the International Court of Justice".

The declarations to which Article 36, paragraph 5, refers created for the States which had made them the obligation to recognize the

jurisdiction of the Permanent Court of International Justice. At the time when the new Statute was drawn up, it was anticipated —and events confirmed this—that the Permanent Court would shortly disappear and these undertakings consequently lapse. It was sought to provide for this situation, to avoid, as far as it was possible, such a result by substituting for the compulsory jurisdiction of the Permanent Court, which was to come to an end, the compulsory jurisdiction of the International Court of Justice. This was the purpose of Article 36, paragraph 5. This provision effected, as between the States to which it applied, the transfer to the new Court of the compulsory jurisdiction of the old. It thereby laid upon the States to which it applied an obligation, the obligation to recognize, *ipso facto* and without special agreement, the jurisdiction of the new Court. This constituted a new obligation which was, doubtless, no more onerous than the obligation which was to disappear but it was nevertheless a new obligation.

In the case of a State signatory of the Charter and of the Statute, the date at which this new obligation arises, the date at which this transfer from the jurisdiction of one Court to that of another Court is effected, is not directly determined. It could only be linked to the signing of the Charter by an interpretation somewhat out of keeping with the provisions of Article 110 of the Charter which, for the date of the entry into force of the Charter and, consequently, of the Statute, have regard to the dates of the deposit of ratifications. Neither of these dates can be taken as fixing the birth of the obligation here under consideration in the case of a State not a signatory of the Charter but subsequently admitted to the United Nations. Until its admission, it was a stranger to the Charter and to the Statute. What has been agreed upon between the signatories of these instruments cannot have created any obligation binding upon it, in particular an obligation to recognize the jurisdiction of the Court.

This was the position of Bulgaria. Article 36, paragraph 5, could not in any event be operative as regards that State until the date of its admission to the United Nations, namely, December 14th, 1955.

At that date, however, the Bulgarian Declaration of 1921 was no longer in force in consequence of the dissolution of the Permanent Court of International Justice in 1946. The acceptance set out in that Declaration of the compulsory jurisdiction of the Permanent Court of International Justice was thereafter devoid of object since that Court was no longer in existence. The legal basis for that acceptance in Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, ceased to exist with the disappearance of that Statute. Thus, the Bulgarian Declaration had lapsed and was no longer in force.

Though the Statute of the present Court could not lay any obligation upon Bulgaria before its admission to the United Nations, and though the Bulgarian Declaration of 1921 had lapsed before

that date, can Article 36, paragraph 5, nevertheless have had the effect that that Declaration must be deemed as between Bulgaria and Israel to be an acceptance of the compulsory jurisdiction of the International Court of Justice? That depends upon the date to which Article 36, paragraph 5, refers when it speaks of declarations "which are still in force", "*pour une durée qui n'est pas encore expirée*". In expressing itself thus, Article 36, paragraph 5, neither states nor implies any reference to a fixed date, that of the signature of the Charter and of the Statute, or that of their original entry into force. These were events to which Bulgaria, which became a party to the Statute only as a result of its admission to the United Nations in 1955, was not privy; it would be permissible to have reference to those dates in respect of the application of Article 36, paragraph 5, only if that provision had referred thereto expressly or by necessary implication; nothing of the kind is stated or implied in the text.

There is nothing in Article 36, paragraph 5, to reveal any intention of preserving all the declarations which were in existence at the time of the signature or entry into force of the Charter, regardless of the moment when a State having made a declaration became a party to the Statute. Such a course would have involved the suspending of a legal obligation, to be revived subsequently: it is scarcely conceivable in respect of a State which was a stranger to the drafting of Article 36, paragraph 5. There is nothing in this provision to show any intention of adopting such an exceptional procedure. If there had been such an intention, it should have been expressed by a direct clause providing for the preservation of the declaration, followed by a provision for its subsequent re-entry into force as from the moment of admission to the United Nations: nothing of the kind is expressed in the Statute.

Article 36, paragraph 5, is expressed in a single sentence the purpose of which is to state that old declarations which are still in force shall be deemed as between the parties to the present Statute to be acceptances of the compulsory jurisdiction of the International Court of Justice. The provision determines, in respect of a State to which it applies, the birth of the compulsory jurisdiction of the new Court. It makes that subject to two conditions: (1) that the State having made the declaration should be a party to the Statute, (2) that the declaration of that State should still be in force.

Since the Bulgarian Declaration had lapsed before Bulgaria was admitted to the United Nations, it cannot be said that, at that time, that declaration was still in force. The second condition stated in Article 36, paragraph 5, is therefore not satisfied in the present case. Thus, even placing itself on the ground upon which the Government of Israel bases its claim, the Court finds that Article 36, paragraph 5, is not applicable to the Bulgarian Declaration of 1921.

This view is confirmed by the following considerations:

On the one hand, the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved; it is not permissible to substitute for this intention to preserve, to secure continuity, an intention to restore legal force to undertakings which have expired: it is one thing to preserve an existing undertaking by changing its subject-matter; it is quite another to revive an undertaking which has already been extinguished.

On the other hand, Article 36, contrary to the desire of a number of delegations at San Francisco, does not make compulsory jurisdiction an immediate and direct consequence of being a party to the Statute. If Bulgaria, which at the time of its admission to the United Nations was under no obligation of that kind in consequence of the lapse of its Declaration of 1921, were to be regarded as subject to the compulsory jurisdiction as a result of its admission to the United Nations, the Statute of the Court would, in the case of Bulgaria, have a legal consequence, namely, compulsory jurisdiction, which that Statute does not impose upon other States. It is difficult to accept an interpretation which would constitute in the case of Bulgaria such a derogation from the system of the Statute.

In seeking and obtaining admission to the United Nations, Bulgaria accepted all the provisions of the Statute, including Article 36. It agreed to regard as subject to the compulsory jurisdiction of the Court, on the one hand, those States parties to the Statute which had made or would make the declaration provided for by paragraph 2 and, on the other hand, in accordance with paragraph 5, those States which, at the time of their acceptance of the Statute, were bound by their acceptance of the compulsory jurisdiction of the Permanent Court. At the time when Bulgaria sought and obtained admission to the United Nations, its acceptance of the compulsory jurisdiction of the Permanent Court had long since lapsed. There is nothing in Article 36, paragraph 5, to indicate any intention to revive an undertaking which is no longer in force. That provision does not relate to the position of Bulgaria at the time of its entry into the United Nations; Bulgaria's acceptance of the provision does not constitute consent to the compulsory jurisdiction of the International Court of Justice; such consent can validly be given by Bulgaria only in accordance with Article 36, paragraph 2.

Article 36, paragraph 5, cannot therefore lead the Court to find that, by the operation of this provision, the Bulgarian Declaration of 1921 provides a basis for its jurisdiction to deal with the case submitted to it by the Application filed by the Government of Israel on October 16th, 1957.

In the circumstances, it is unnecessary for the Court to proceed to a consideration of the other Preliminary Objections to the Application raised by the Government of the People's Republic of Bulgaria.

For these reasons,

THE COURT,

by twelve votes to four,

finds that it is without jurisdiction to adjudicate upon the dispute brought before it on October 16th, 1957, by the Application of the Government of Israel.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of May, one thousand nine hundred and fifty-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Israel and the Government of the People's Republic of Bulgaria, respectively.

(Signed) Helge KLAESTAD,
President.

(Signed) GARNIER-COIGNET,
Deputy-Registrar.

Vice-President ZAFRULLA KHAN states that he agrees with the Judgment of the Court. Paragraph 5 of Article 36 of the Statute of the Court requires that the State having made a declaration of acceptance of the compulsory jurisdiction of the Permanent Court should be a party to the Statute of the International Court and that the declaration should still be in force. The paragraph is not, by its language, limited in its application to States who became signatories of the Charter of the United Nations, though in actual fact the paragraph did not become applicable to any other State, as no other State, having a declaration still in force, became a party to the Statute of the International Court before the dissolution of the Permanent Court put an end to all declarations accepting its jurisdiction. If Bulgaria, or any other State whose declaration accepting the compulsory jurisdiction of the Permanent Court was still in force, had become a party to the Statute of the International Court *before* the dissolution of the Permanent Court, paragraph 5 of Article 36 of the Statute of the International Court would have become applicable.

Judges BADAWI and ARMAND-UGON, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their Separate Opinions.

Judges Sir Hersch LAUTERPACHT, WELLINGTON KOO and Sir Percy SPENDER, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court a statement of their Joint Dissenting Opinion.

Mr. GOITEIN, Judge *ad hoc*, availing himself of the right conferred upon him by Article 57 of the Statute, appends to the Judgment of the Court a statement of his Dissenting Opinion.

(Initialled) H. K.

(Initialled) G.-C.