SEPARATE OPINION OF JUDGE BADAWI

[Translation]

I concur in the operative part of the Judgment and while accepting the grounds on which it is based, restricting the effects of the fiction established by Article 36, paragraph 5, to signatories of the Charter or original Members of the United Nations, I am of opinion that there is a further limitation which ought to be added.

Indeed, in my opinion, only those original Members of the United Nations who had made declarations accepting the jurisdiction of the Permanent Court of International Justice *for a definite period of time* are included within the scope of Article 36, paragraph 5.

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But before establishing the correctness of the interpretation according to which an indication of that restriction is to be found in the expression "still in force" and the corresponding expression in the French text "*pour une durée qui n'est pas encore expirée*", it is desirable to show that the construction of that expression by Israel, as referable to the date of the entry into force of the Charter, apart from the arbitrary character of its selection, encounters an inescapable legal objection.

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In fact, the date of the entry into force of the Charter has no individual significance. It marks the beginning of the existence of the Charter as an international pact giving rise to rights and obligations in the international sphere. It breathes life into and gives effect to earlier ratifications as well as to subsequent ratifications by signatories of the Charter. But States admitted to the United Nations after that date do not and cannot retroactively assume any obligation going back to that date. All the elements constituting the obligations assumed by them as a consequence of their admission to the United Nations (parties, consent and subject-matter) should be contemporaneous with the date of their admission and it is at that date that their obligations arise.

Accordingly it cannot properly be held that any acceptance is formed—even fictitiously—before a State's admission to the United Nations (failure of consent) or after the dissolution of the Permanent Court of International Justice (failure of subject-matter).

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In these circumstances, to date back the obligation of Bulgaria, after it had become a Member of the United Nations, to the entry into force of the Charter, as the moment of virtual acceptance, would be to confer upon that fixed and absolute date the magical effect of giving to a declaration of acceptance, made by a State which was not a party to the Charter at the time of the signature, an existence independent of its author.

An interpretation of this kind, which disregards the essential co-existence in an obligation of consent (real or fictitious), subject-matter and parties, and separates these elements giving to each a separate and distinct existence, is clearly inadmissible.

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What then is meant by the expression "still in force"? It has the same meaning as the corresponding expression in the French text *"pour une durée qui n'est pas encore expirée"*. The difference between the two texts is merely apparent and formal. In fact, the expression "still in force" does not refer to a given date but implies a period of time. It relates to any moment within the duration of a declaration of acceptance and thus corresponds to the French expression *"qui n'est pas encore expirée"*.

The meaning of the two expressions "still in force" and *"pour une durée qui n'est pas encore expirée"* in the English and French texts of Article 36, paragraph 5, having been thus defined, it becomes a simple matter to define the intentions of the authors of the Charter and to determine the interpretation of that provision.

It is known that the provision arose out of a desire to reconcile the views of those in favour of the compulsory jurisdiction of the new Court, with those who wished to retain the optional clause, by the transfer to the new Court of declarations of acceptance of the jurisdiction of the Permanent Court of International Justice.

In these circumstances, the first problem which arises is to determine which declarations were thus to be transferred.

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If all declarations were to be transferred, including those made for a certain time and those made unconditionally (that is without any time-limit), that would have required an absolute formulation from which any concept of duration would have been excluded.

But any such absolute form would have done violence to the intentions of States which had made declarations with a time limitation since their acceptance of the Permanent Court of International Justice would have been transferred to the International Court without a time-limit.

To cover the two categories of declarations, while continuing to respect the desires of States which had accepted with a time-limit, a double and comparatively complicated formula would have been necessary.

The authors of the Charter preferred to deal only with the category of declarations containing a time limitation, as is shown by the wording which they adopted which is as categorical as it could be both in the French text *"pour la durée restant à courir"* and in the English text "for the period which they still have to run".

This choice was, moreover, justified by the fact that, according to all the writers, the majority or the greater number of States which accepted the jurisdiction of the Court belonged to that category of declarations and, furthermore, because acceptances without limitation of time, apart from the fact that they constituted in the beginning an unevolved form of the optional clause which soon fell into disuse in the subsequent practice of States, are more closely linked to the existence of the Permanent Court of International Justice. Indeed the absence of the independent and additional time factor postulates the termination of the acceptance as soon as the subject-matter of the acceptance ceases to exist or is destined to cease to exist.

The Bulgarian Declaration of 1921 being unconditional, that is without any time-limit, could therefore not have been transferred to the International Court of Justice even if the provision of Article 36, paragraph 5, had not to be restricted to signatories of the Charter.

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But, quite apart from any question of the construction of paragraph 5 of Article 36, there is an organic consideration which peremptorily excludes the possibility of giving any effect to the Bulgarian declaration.

Bulgaria was, at the time of the San Francisco Conference, an enemy country. But when it was decided to establish a new Court, this decision was taken on the declared ground that if it had been decided merely to reinstate the old Permanent Court of International Justice, the enemy States which had signed the 1920 Statute would automatically have been parties to the Statute of the Court, a consequence regarded as shocking and one which the United Nations were determined to avoid.

In these circumstances, it would be contrary to the intentions manifestly revealed that a fiction established by Article 36, paragraph 5, should remain dormant to be subsequently applied to a State whose admission to the United Nations is characterized by an *intentional interruption* between the old Covenant of the League of Nations and the Protocol of the Permanent Court of

International Justice and the declarations relating to it, on the one hand, and the Charter and the Statute of the International Court of Justice on the other hand.

The Treaty of Peace concluded with Bulgaria, which effaced the latter's enemy status, and Bulgaria's admission to the United Nations under Article 4 of the Charter, constitute for Bulgaria a new career so far as both the Charter and the Statute are concerned, to which any provision linking the past with the present must be extraneous.

(Signed) A. BADAWI.