DISSENTING OPINION OF JUDGE GOITEIN

It is with diffidence that I dissent from the judgment of the majority of the Court. I am strengthened in the decision I have come to by the views of my learned colleagues who have dissented. These appear to me to give a less strained interpretation of the Statute that binds us than that adopted by the majority, and their reading of the law enables this Court to fulfil and not deny the purpose for which it was founded.

Bulgaria has submitted no facts to this Court and we can therefore only rely on those stated in the Israel Memorial, facts which have still to be proved. The chronicle of events, as set out by the Government of Israel, is as follows: "On July 27, 1955, a civil passenger aircraft, registered in Israel ... while on a scheduled commercial flight from London to Lod ... came down in flames in the region of Petritch, Bulgaria. Not one of the occupants of this aircraft—fifty-one passengers and seven members of its crew—survived the disaster ... the Bulgarian Government, on 28 July, officially ... announced how this had come about. That Government's armed forces had shot down and destroyed the aircraft, killing all its occupants. This was amplified ... on 4 August when the Bulgarian Government ... again gave out that its armed forces had destroyed the aircraft, those armed forces having acted in haste and without taking all the necessary measures... The Bulgarian Government gave ... undertakings regarding the identification and punishment of those guilty ... as well as regarding the eventual payment of compensation." (See the full text on pp. 4 and 5 of the Memorial of the Government of Israel.) After setting out the above chronicle of events, and after referring to the diplomatic negotiations which had failed to bear fruit, the Government of Israel stated that it had turned to this Court and prayed that it formally declare "that Bulgaria is responsible under international law for the destruction of the aircraft and by determining the amount of compensation due". (*Ibid.*, p. 5.)

If the facts are as stated in the Memorial, as summarized above, then this would appear to be a dispute with which this Court and this Court alone is competent to deal. In my opinion, therefore, this Court should be anxious to right a wrong and take upon itself to judge between the Parties before it. The Court should refuse to exercise jurisdiction only if its Statute clearly and unequivocally withholds jurisdiction from it. I shall show in this Opinion that far from withholding jurisdiction from the Court, the law unequivocally clothes it with power to decide the present dispute. The Statute of

this Court, which otherwise follows that of the Permanent Court, enacted a special paragraph—paragraph 5 of Article 36—precisely in order to clothe this Court with the jurisdiction it might otherwise have been unable to exercise.

I respectfully agree with my colleagues in the majority that this Court must first be satisfied that the Parties have voluntarily submitted to its jurisdiction before it can take upon itself to decide a dispute brought before it. I do not agree that that voluntary submission may not be inferred from an express presumption of law laying down that such a submission has been made.

The Israel Government in its Memorial (pp. 3 and 4), in order to show that this Court had jurisdiction, relied upon Declarations which had been made by both Parties accepting such jurisdiction. Reference was made to the Declaration of Israel dated 3rd October, 1956, and to that of Bulgaria dated 12th August, 1921. I shall refer to the latter in this Opinion as the Bulgarian Declaration. In its First Preliminary Objection, the only one with which the judgment of the majority, and hence this Opinion, deals, the Bulgarian Government submitted that "Article 36, paragraph 5, of the Statute of the International Court of Justice is inapplicable in regard to the People's Republic of Bulgaria."

The question whether this Court has or has not jurisdiction depends accordingly on the true interpretation of that paragraph, and on the answer to the question whether that paragraph is applicable to the Bulgarian Declaration. Indeed, the question raised by the First Preliminary Objection of Bulgaria may be confined to narrower limits: what is the meaning of the words in that paragraph "still in force" and of the words "parties to the present Statute"? In the ultimate analysis the Preliminary Objection may be accepted or rejected in accordance with the interpretation given to the latter words alone.

I will first read the paragraph as a whole, without taking into consideration the submissions made on behalf of Bulgaria and without referring to the reply of the Agent for the Government of Israel.

The submissions of Counsel for Bulgaria were intended to show that the terms of Article 36 (5) of the Statute were not applicable to the present case. To reach this conclusion he was forced to give a special and peculiar meaning to the words used in the paragraph in question, and in accepting his submissions the majority of this Court has—and I say this with the greatest respect—been bound to give meanings to the terms employed by the legislator which are not their ordinary meanings, and this Court has been forced

to take into account considerations which, it seems to me, are irrelevant.

The opening words of the paragraph are: "Declarations made under Article 36 of the Permanent Court of International Justice ..." It is agreed that Bulgaria made such a Declaration. The opening words, therefore, as applied to the present case, may be interpreted as: "The Bulgarian Declaration ..."

The following words are, in the English text, "which are still in force", or, in the French text, "*pour une durée qui n'est pas encore expirée*". Although I shall enlarge on this phrase in the following paragraphs, here it may be said that there is no difficulty in giving the ordinary and natural meaning to this phrase. As the present tense is used and the word "still", the interpreter of these words, without any reference to dictionaries, would understand that the legislator is speaking as of the Statute date. A declaration existing on 24th October, 1945, was one to be "caught up" by the paragraph. The French text, however, which is as binding upon us as the English, suggests that a declaration is still in force when it has not come to an end by effluxion of time. Counsel for Bulgaria was well aware of this and he vainly tried to find support in the Spanish, Russian and Chinese texts rather than the French and, being a Frenchman, expressed his regret at this unpatriotic preference. But it needs more than mere pleading to make words change their meaning. The words, therefore, "which are still in force" mean, as I have said, in force on the Statute date, or, alternatively, refer to declarations which have not come to an end by effluxion of time.

Was the Bulgarian Declaration still in force in October 1945? There is no doubt that it was. Here, too, the Bulgarian delegation does not contend otherwise. It claims that the Declaration "died" in the following year upon the dissolution of the Permanent Court. The Declaration was also in force because it had not expired by the effluxion of time. Nor had it been denounced. It was therefore a declaration covered by Article 36 (5). I accordingly read that part of Article 36 (5) which I have now discussed as "The Bulgarian Declaration, which is still in force..."

The following words of the paragraph are: "shall be deemed". Reading these words I would infer that the legislator is about to lay down a legal presumption which would apply to the Bulgarian Declaration from the Statute date and for the future. Here it is important to stress, because the Bulgarian Government's representatives appear to have overlooked this elementary fact, that the legislator is not stating the legal position as it was at the time but

the legal position as he was declaring it to be from the date of the enactment of the Statute and for the future. The draftsman must have been fully aware of the fact that the Bulgarian Declaration was in the nature of a consensual undertaking, made in connection with a Court that was about to disappear and that not a jot of it could be altered without the consent of Bulgaria. Nevertheless, as far as concerned those who were or wished to be Members of the United Nations, their declarations were from now—the year 1945—and for the future to be deemed *(seront considérées)* to be declarations made in connection with the new Court, the International Court of Justice.

The presumption would be as valid in 1955 as in 1945—provided, of course, that Bulgaria had in the meantime become a Member of the United Nations. With that point I shall deal when I come to the words which follow. The paragraph, as applied to the present case, now reads: "The Bulgarian Declaration, which is still in force, shall be deemed..."

The words which follow are "as between the parties to the present Statute". I have already said that, in the final analysis, these are the critical words of the paragraph and the basic difference between the majority of this Court and those dissenting lies in the interpretation to be given to these words. There is no difficulty about the words "present Statute". The word "present" appears because the Statute of this Court (as is stated in Article 92 of the Charter) is based on that of the Permanent Court, but nothing depends on this word. Nor does any question arise as to the word "Statute". What, then, is the meaning of "the parties" in the context of "parties to the present Statute"? The same words are found when the Court is first mentioned in the Charter. Article 93 reads:

> "All Members of the United Nations are *ipso facto* parties to the Statute..."

Article 94 reads:

> "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice."

Unless there were a contrary intention expressed in Article 36 (5) of the Statute, I would see no way of interpreting the words "parties to the present Statute", except as is expressly declared to be their meaning in Article 93 of the Charter. No contrary intention is expressed in Article 36 (5); therefore, using ordinary canons for the interpretation of Statutes, I would hold without hesitation that whenever a State becomes a Member of the United Nations it becomes a "party to the present Statute", and the words found in Article 36 (5) of that Statute apply specifically to that State. (For the purposes of the present case it is not necessary to refer to those States which "may become a party to the Statute" under Article 93 (2)

of the Charter.) If further elucidation of the words were necessary, one might turn to paragraph 2 of the selfsame Article 36, where precisely the same phrase is used, "the States parties to the present Statute", which must refer to Members of the United Nations, whether to those who were Members at the time of the enactment of the Statute or to those who would subsequently become Members, ten or twenty or thirty years later. Any interpretation which would give one meaning to the words "parties to the present Statute" in Article 36 (2) and a different meaning to those words in Article 36 (5) would be untenable. Again, the words "parties to the Statute" appear in Article 36 (4) and obviously refer to all Members of the United Nations and not to the original signatories of the Charter. The majority of the members of this Court are of the opinion that in Article 36 (5) the words "parties to the present Statute" must be confined to original signatories of the Charter. and not to those who subsequently became "parties to the present Statute". When the legislator wished to refer to "original Members" he did so in plain words (see for example Article 3 of the Charter). The words in Article 36, paragraph 5, cannot accordingly be confined to "original Members". I therefore read the words of the paragraph so far discussed as meaning: "The Bulgarian Declaration which is still in force shall be deemed as between Members of the United Nations..."

The questions that next arise are whether Bulgaria, when raising its Preliminary Objection or, earlier, when Israel brought its dispute with her before this Court, was *(a)* a Member of the United Nations and therefore *ipso facto* a party to the Statute, and *(b)* whether it had or had not denounced its Declaration—for there is no question of effluxion of time—and *(c)* whether Israel was a Member of the United Nations and a party to the Statute. The answer to *(a)* is that Bulgaria had become a party to the Statute in December 1955. The answer to *(b)* is that Bulgaria had at no time and has not until today denounced its Declaration, and the answer to *(c)* is that Israel was at all relevant dates a Member of the United Nations and a party to the Statute.

I come now to the last words of the paragraph which need concern us and which have not directly given rise to any question of interpretation. The words are: "to be acceptances of the compulsory jurisdiction of the International Court of Justice...".

These words mean that a declaration under Article 36 of the Statute of the Permanent Court accepting the compulsory jurisdiction of that Court shall from the date of the Statute and for the future be deemed to be a declaration accepting the compulsory jurisdiction of this Court, the International Court of Justice.

As applied to the present case, Article 36 (5) now reads: "The Bulgarian Declaration which is still in force shall be deemed, as between Members of the United Nations, to be acceptance of the

compulsory jurisdiction of the International Court of Justice."

It would accordingly follow that the law presumed that Bulgaria, having voluntarily submitted to the jurisdiction of the Permanent Court, had voluntarily submitted to the jurisdiction of this Court. That would lead me to overrule the first Bulgarian Preliminary Objection.

Counsel for Bulgaria, however, submitted to us that we were not entitled to read Article 36 (5) as it stands but that we must give a special meaning to the phrase "which are still in force" and that there must be some contemporaneity: that is to say, the State must be a Member of the United Nations while its declaration is still in force and that no declaration of a non-Member could survive the dissolution of the Permanent Court. The paragraph does not support this contention, so the Bulgarian Delegation would ask us to read into the words: "still in force" the following: "which shall at the time the Declarant becomes a Member of the United Nations, provided always that the Permanent Court has not been dissolved, be still in force".

For the "parties to the present Statute", Counsel for Bulgaria would apparently read "parties to the present Statute at the time of the dissolution of the Permanent Court". To interpret the former expression he would add some twenty-four words and to interpret the latter some ten words. He did not explain to us why, if that was the intention of the legislator, the appropriate words had not been used. I do not remember that he contended for the interpretation which the majority of the Court has given to the phrase.

It would appear as if the majority of the Court accepts part of this Bulgarian contention. If the words are capable of a reasonable interpretation according to their ordinary meaning, it does not seem to be consonant with a proper interpretation of the Statute to add words which are not there. The interpretation which I have adopted is that the time referred to in the words "are ... still..." is the Statute date or, in the alternative, that the words used refer to a declaration which is no longer in force by effluxion of the term for which it was made. Accordingly, there is no need to alter the wording of the paragraph to give it the meaning contended for by the Government of Bulgaria. The legislator in our case has done something very simple. "Live" declarations at the time of the enactment are to be kept alive for the future. These might "die" with the "death" of the Permanent Court, were they not kept "alive" by Article 36 (5).

It is at this point that the second divergence appears between the majority of the Court and the Judges dissenting. The Bulgarian

representatives repeated over and over again that once the tree was felled the branches died with the tree. The tree, of course, was the Permanent Court and the Bulgarian Declaration was the branch. Counsel for Bulgaria said:

> "Mais à partir de la dissolution de la Cour permanente, cette déclaration s'est trouvée dans la situation bien connue de la fameuse jument de Roland, qui elle aussi avait toutes les qualités, mais, par malheur, elle était morte. Et aucun historien n'a jamais prétendu qu'après ce petit accident elle était encore en vie."

Nothing could revive the dead branch, just as nothing could revive the dead horse. This is to misunderstand the whole purpose of the paragraph. Perhaps rather than a misunderstanding, it is an attempt to nullify the paragraph. An acceptance of the paragraph as it stands inevitably puts an end to the first Bulgarian Preliminary Objection. It must, therefore, be read away, removed from the Statute. There are several ways of doing this. One, as I have said, is to misunderstand its whole purpose. The other is to submit that perhaps the Conference of San Francisco, at which Bulgaria was not present, could not have enacted the paragraph for, by doing so, it would have been acting *ultra vires:* the Conference could not keep alive, without the consent of Bulgaria, a declaration that was doomed to "die" with the "death "of the Permanent Court. This was soberly argued before us and it would seem as if echoes of the latter part of this submission are to be found in the Judgment of the majority.

Article 36 contemplates two kinds of declarations:

(1) those to be made by Members of the United Nations in the future (paragraph 2);

(2) those already made by States (whether at the time Members of the United Nations or not) in the past in connection with the Permanent Court (paragraph 5).

The legislator knew that the Permanent Court was *in extremis* and that it would soon be dissolved, to make room for the International Court of Justice. If there were no legislation to prevent it, the declarations made in connection with the Permanent Court would indeed, as Counsel for Bulgaria argued, come to an end. The legislator, anxious that all the progress that had been made between the two wars in furthering international jurisdiction should be preserved, legislated for the preservation of declarations already made. The Permanent Court would be dissolved: the declarations would survive. That is why Article 36 (5) was enacted, and there is nothing in the paragraph that even hints that the declarations in question should survive only until the dissolution of the Permanent Court. To introduce the proviso into the paragraph that the decla-

rations were to end with the end of the Permanent Court is not to read but to misread the paragraph. This Court is being asked not to interpret the law but to make new law. In so far as the majority of this Court bases its Judgment on this submission of Counsel for Bulgaria it is not, in my opinion, interpreting the Statute as it stands but is remoulding it as it considers it should have been drafted.

The further argument that the paragraph is somehow *ultra vires* need not detain us long. Article 92 of the Charter lays it down that this Court "shall function in accordance with the annexed Statute which ... forms an integral part of the present Charter". Article 1 of the Statute lays it down: "The International Court of Justice ... shall function in accordance with the provisions of the present Statute." This Court has no authority to look behind the articles of the Statute and question the right of the legislator to enact any particular article or paragraph. We only exist as creatures of the Statute, and the only decisions we are authorized to make are those made in accordance with the Statute as it is: not as we might like it to be.

A further reply to the Bulgarian contention is that on becoming a Member of the United Nations Bulgaria accepted "the obligations contained in the present Charter" (Charter, Article 4), and thus became "a party to the Statute of the International Court of Justice" (Charter, Article 93) and was bound by Article 36 of the Statute as by all the other articles thereof.

Long before her admission to the United Nations, the Bulgarian Government had publicly declared in 1948 (see Annex 43 at the end of the Written Observations of the Government of Israel) its adherence to the Charter and, therefore, to the Statute of this Court. These are the terms of the declaration:

> "In the name of the People's Republic of Bulgaria, I ... declare that the People's Republic of Bulgaria hereby accepts without reserve the obligations arising from the United Nations Charter and promises to observe them as inviolable from the date of her accession to the United Nations."

Before December 1955, when Bulgaria was admitted as a Member of the United Nations, she had two clear courses open to her: to refuse to become a Member of the United Nations, or to denounce her Declaration of 1921. She chose to become a Member: she did not denounce her Declaration. Whether the States at San Francisco had the authority or not to enact Article 36 (5), Bulgaria ratified what had been done there when she became a Member of the United Nations without denouncing her Declaration.

I hold, therefore, that there is no reference to the dissolution of the Permanent Court in Article 36, which gives a *terminus ad quem*

for declarations, and we are not entitled to read such a reference into the Article. Further, we are not entitled to ask the question whether the States at San Francisco were authorized or not to enact a paragraph that might affect a State not present at San Francisco; in any event, Bulgaria ratified what had been done at San Francisco and accepted all the obligations of the Statute when she became a Member of the United Nations.

Reference must be made to two other contentions. Both of these were stressed by the Bulgarian delegation and both appear to have played some part in leading the Court to arrive at its conclusion. One contention was that even if Article 36 (5) did at one time apply to the Bulgarian Declaration, it could not be supposed that the paragraph kept alive a dead declaration for ten years. So to read a transitional section of the law would be to give an unreasonable interpretation to it. The second contention was that this Court could not possibly accept jurisdiction unless Bulgaria had specifically and in clear terms accepted the jurisdiction of this Court. Submission to jurisdiction must not be inferred.

The former contention was buttressed by a large number of illustrations from the Russian theatre and from Scandinavian folklore, but not by any sound submission in law. It was said that a declaration could not wander about in the Land of Shades from 1945 to 1955 and then, by the touch of a magic wand, come to life. It was argued further that if, between those years, Bulgaria had been brought before this Court, she would have had a complete answer, namely, that she was not a party to the Statute. If, therefore, in the year 1953 Bulgaria could not have been bound by her Declaration of 1921, she could not be bound by it in 1957. These arguments, however attractively and persuasively put before us, cannot convince so long as Article 36 (5) stands, and their submission was but another attempt not to interpret but to repeal the paragraph. If the legislator chose to consider a declaration as binding upon Members of the United Nations, whenever they might become Members thereof, it might certainly happen, as it did in this case, that a particular declaration would not be effective for a number of years. In the present case, also, the mention of the period of ten years is misleading. Not alone did the law keep the Declaration alive, but the Bulgarian Government did so as well. For in 1947, within two years of the enactment of the Statute, Bulgaria was asking to become a Member of the United Nations. In 1948 she made the solemn declaration I have cited above. She continued to press for admission throughout the years until 1955. It was due to political considerations, not dependent on Bulgaria, that she was not admitted earlier. On the correct reading of the Statute, of which she was continuously asking to become a party, her Declaration was still alive and would become effective on the day she became a Member. At least from 1947, Bulgaria was continuously breathing

the breath of life into an ancient declaration, a declaration voluntarily made in 1921 and, according to the argument of the Bulgarian delegation, still alive in 1946.

As has been said, at no time during those years did she denounce her Declaration. In the light of these facts, it cannot be held that her Declaration lived in a World of Shades. It lived a full life in the Permanent Court for a quarter of a century, it lived in this Court for the next ten years, by virtue of two very powerful life-givers, the Statute and the People's Republic of Bulgaria.

The second contention, that an acceptance of jurisdiction must be explicit and not implicit, appears to have been accepted by this Court in its Judgment. The draftsman of the Statute drew no such distinction. He made provision for two kinds of declarations, those made in the past, those to be made in the future. Future declarations are dealt with in Article 36 (2), and past declarations in Article 36 (5). There is no particular sanctity given to the former nor less validity to the latter. The only difference the legislator has drawn between them is that the former are to be deposited with the Secretary-General of the United Nations (Article 36 (4)), while the latter, for obvious reasons, need not be. The effectiveness of the two kinds of declarations is the same. New declarations made by States prove that such States "recognize as compulsory ... the jurisdiction of the Court..." (Article 36 (2)). Old declarations made by States are "deemed ... to be acceptances of the compulsory jurisdiction of the ... Court" (Article 36 (5)). It is to be noted that by Article 92 of the Charter, all Members of the United Nations are —the wording is not "are deemed to be"—parties to the Statute. So that when Bulgaria became a Member, she became *ipso facto* a party to the Statute, and the single presumption made by the Statute was that her voluntary declaration recognizing as compulsory the jurisdiction of the Permanent Court was a declaration recognizing as compulsory the jurisdiction of this Court.

In my opinion, the First Preliminary Objection of the Government of Bulgaria should be overruled.

(Signed) GOITEIN.
